IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1017

JAMES A. RHODES,
Petitioner

v.

ARTHUR KRAUSE, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 17, 1978

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON D.C. 20001

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Petitioner, James A. Rhodes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on September 12, 1977, granting a new trial to plaintiffs in this action.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not officially reported, is set forth in the separately bound Appendix at pp. A1-A35.[1] The Order of the Court

[1] A single, separately bound Appendix containing the opinions below is being filed in this case and in *Del Corso* v. *Krause*, which seeks review of the same judgment. That Appendix will be referred to herein as "App."

of Appeals denying the petitions for rehearing and the opinion of Circuit Judge Weick, dissenting from the denial of en banc consideration, are set forth in the App. A36-A45. The District Court's Memorandum and Order overruling plaintiffs' motion for new trial and judgment notwithstanding the verdict is set forth at App. A46-A48.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 12, 1977. A timely petition for rehearing with suggestions for rehearing en banc was denied on October 20, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the use of excessive force in attempting to deal with a civil disturbance give persons injured thereby a cause of action under 42 U.S.C. § 1983 on the theory that they have been deprived of life, liberty or property without Due Process of Law?

2. Is the Court of Appeals' decision directing a new trial as to Governor Rhodes consistent with the limited scope of official liability authorized by *Scheuer* v. *Rhodes*, 416 U.S. 232?

3. (a) Does a threat to a juror in a civil action create a presumption of prejudice authorizing a Court of Appeals to itself set aside the jury's verdict on the ground that no record has been made in the trial court to rebut that presumption?

(b) If so, may the Court of Appeals set aside the verdict, although the party challenging the verdict did not, after learning of the threat, object to submitting the case to the jury without an interrogation of the juror who was threatened?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1983. They are reprinted in pertinent part at p. B1, *infra*.

STATEMENT OF THE CASE

I. The Complaints and this Court's Decision in *Scheuer* v. *Rhodes*, 416 U.S. 232.

Petitioner, James A. Rhodes, Governor of the State of Ohio, was a co-defendant below in actions brought by nine persons injured and the personal representatives of four persons killed on the campus of Kent State University on May 4, 1970. Named as defendants with Rhodes were the Adjutant General of Ohio (Sylvester Del Corso), the Assistant Adjutant General of Ohio (Robert Canterbury), a number of commissioned officers and enlisted men of the Ohio National Guard, and the President of Kent State University.

The action is now here after a trial which was held pursuant to this Court's remand in *Scheuer* v. *Rhodes*, 416 U.S. 232 (hereafter *Scheuer*). The Court there described the complaints (which were consolidated for trial) as follows:

> "In essence, the defendants are alleged to have 'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken 'under color of state law' and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the com-

plaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office." (416 U.S. at 235)

In *Scheuer*, this Court held, contrary to the District Court and to the Court of Appeals, that "dismissal [of the complaints] was inappropriate at this stage of the litigation * * *" *id.* It rejected the lower courts' theory that the actions are barred by the Eleventh Amendment; it held further that under 42 U.S.C. § 1983 the executive officers, including Governor Rhodes, do not possess absolute immunity from suit, but rather enjoy a qualified immunity, which the Court described as follows:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." (416 U.S. at 247-248.)

The Court carefully chose to go no further in delineating the scope of the immunity at that stage of the record. The Court defined the issues to be litigated on remand:

> "The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law, and whether they acted

> in good faith in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.
>
> "We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved." (416 U.S. at 250.)

II. The Evidence Pertaining to the Liability Issues Presented by this Petition.

Following remand, the parties engaged in extensive discovery. Although the *Scheuer* opinion did not direct a trial on the merits, motions for summary judgment were overruled. The trial, which lasted approximately fifteen weeks, established the following concerning the issues of liability presented by this Petition:

On Friday, May 1, 1970, demonstrations were held on the campus of Kent State University for the purpose of burying the United States Constitution and to protest the invasion of Cambodia by United States troops in the Vietnam war (A. 1037; 1268)[2]. That evening, several hundred persons gathered in downtown Kent, Ohio, damaging and looting several business buildings, starting fires, and assaulting automobiles and their occupants (A. 3182-

[2] Throughout this petition, references to the Appendix filed in the Court of Appeals are designated (A. ——). References to the Supplemental Appendix filed in the Court of Appeals are designated (S. ——).

8; 3248; 3255; 3398; S. 53-55). Members of the Kent Police Department, attempting to disperse the crowd and prevent the damage, were injured (A. 3189-92).

As a result of the Mayor's own observation of the extensive damage, and discussions with members of the City of Kent police department, the Mayor, at approximately 12:30 A.M., on Saturday May 2, declared a state of civil emergency and established a curfew (A. 3397-3401; Pl. Ex. 48.). The Mayor called the Governor's office and explained the situation, but he did not then request the assistance of the National Guard (A. 3397-8). In turn, the Governor's office instructed the National Guard to investigate the conditions in the City of Kent, and the Guard sent a liaison officer to the city (A. 2677; 3269; 3406). At approximately 5:30 P.M. on May 2, the Mayor of Kent, after consultation with local law enforcement officers, did ask the Governor's office for assistance in maintaining law and order (A. 3193; 3270; 3447; 3413). The Mayor felt the city did not have sufficient forces to maintain law and order (A. 3447). After consulting with his staff, Governor Rhodes ordered National Guard units to the City of Kent to aid the civil authorities (A. 2664; 2677-9). The evidence established that the National Guard was ordered to duty in aid of civil authorities, and that, at all times, the local authorities were in control (A. 3440-1; 3450).

The violence moved from the City of Kent to the Commons area of the Kent State University Campus, where student demonstrators set fire to the University's ROTC building (A. 1012; 1274-5; 1303; 1366; 2198-2200; 3227-31). Firemen from the City of Kent, sent to fight the ROTC building fire, were assaulted by the demonstrators (A. 3229); fire hoses were slashed and destroyed (A. 1199; 1996).

Officials in charge of security at Kent State University decided help was needed to control the situation (A. 3489-90). Members of the National Guard were requested by the police department to go on campus, to maintain order and to stop looting and burning (A. 3274). Thereafter, the Ohio State Highway Patrol arrived to assist in maintaining order on campus (A. 2272; 3335; 3341-6).

Plaintiffs conceded in the court below:

> "Plaintiffs concede on appeal, just as they did at trial, that these events justified the Governor's call-up of National Guard troops to assist civilian authorities in the City of Kent." (Reply Brief, p. 27)

On Sunday morning, May 3, 1970, Governor Rhodes arrived in the City of Kent, and was informed by General Del Corso that the violence was under control and order temporarily restored (A. 2283). The Governor then met briefly at the fire station with city and local law enforcement officials to be briefed on the situation as it then existed (A. 2710-13; 3415-6).

At the conclusion of this meeting, a press conference was held at the insistence of the news media (A. 3416; 2732-3). During this conference, the Governor and General Del Corso expressed their concern over the situation in the City of Kent and on the Kent State campus. The Governor assured the local officials that the National Guard would assist them in protecting their community until peace and order were completely restored (A. 2740-44; Court Exhibit 2).

Following the press conference, Governor Rhodes and General Del Corso left the City of Kent. As the Governor was leaving the Kent State University Airport, he met briefly with the President of the University, and informed him that the National Guard was on campus to help maintain peace and order and to insure that classes could continue. Governor Rhodes did not return to the

campus; he was not present on May 4, 1970, the day the shooting occurred (A. 2787-8; 2595-2600).

Later on May 3, a crowd began to form on campus despite patrols by National Guardsmen and a small number of Highway Patrolmen (A. 3346-50). The demonstrators moved to the University President's home; because of rumors that the home would be burned, the crowd was dispersed (A. 0871; 1463). A cordon of police, sheriff's deputies and Guardsmen stopped the moving mob from reaching the downtown area (A. 3200; 3285). The people were ordered to disperse because they were violating the curfew (A. 3205). Some rioters responded by rushing the police officers and Guardsmen, and assaulting them with various objects (A. 3209; 3285; 3205-8; 3358-9). Approximately eighty persons were arrested for violation of curfew (A. 3218).

At about 10:00 a.m. on Monday, May 4, 1970, General Canterbury called a meeting of city officials, local law enforcement authorities, University officials, and the Highway Patrol representative (A. 2426; 2531-33). The purposes of the meeting were to review the events of the past 24 hours, to discuss a workable curfew for both the City of Kent and the Kent State University Campus, and to determine whether the National Guard could be recalled from the community and the campus (A. 2430; 3669-70). Although General Canterbury expressed his desire to remove the troops as soon as possible, city officials expressed their concern that the troops should not be withdrawn before the situation was completely under control (A. 2507; 2609; 3292; 3423; 3670). At this Monday morning meeting, University officials reported that another mass demonstration was scheduled to be held at noon on the University Commons (A. 2430; 2612; 3671). It was decided that the rally should not be permitted (A. 2432; 3292-4; 3380; 3387; 3430-2; 3436). After leaving the Monday morning meeting, General Canterbury advised the commander of the troops that the Guard had been given the mission by the local authorities to disperse the scheduled student demonstration (A. 2446; 2449-50; 2530-1). The Guardsmen were formed in line in front of the burned-out ROTC building (A. 2115).

By noon, the crowd had grown to thousands (A. 1316). Persons were observed carrying bags of rocks, wearing heavy jackets and gloves and carrying gas masks (A. 0842; 0847; 2466; 3368). Some of the individuals were seen throwing stones (A. 0949-51). General Canterbury requested a member of the Kent State University Police Department to order the crowd to disperse (A. 0892-3; 2458-9). Riding in a military jeep, with a loudspeaker, the police officer ordered the people in the crowd, for their own safety, to disperse, advising them the gathering was illegal (A. 2180; S. 62). They responded to the announcement by throwing many rocks at the jeep, and shouting obscenities and anti-war slogans (A. 0936; 1015; 1187; 1999; 2223; S. 62-4). The jeep returned to the area of the ROTC building because the crowd, rather than dispersing, was rapidly growing in size and was becoming more violent (A. 2550; 3368).

Tear gas was fired (A. 2468); the demonstrators still refused to disperse, throwing the tear gas canisters and other missiles back toward the Guardsmen (A. 762; 788). Because of high winds, the tear gas was ineffective (A. 2551-3). A unit of 104 enlisted men and eleven officers prepared to disperse the crowd (A. 2482; 2551-3). Before moving across the Commons, the Guardsmen had been ordered to load and lock their weapons (A. 2115; 1712-14). Throughout their movements, the Guardsmen were struck with rocks (A. 2555).

At a point during the Guard maneuvers, some of the Guardsmen discharged their weapons. There was no order or command to fire. Immediately after the Guardsmen fired, the officers and senior enlisted men shouted, "Cease

fire", and attempted to stop the shooting (A. 2562-3). After a few seconds, the firing ceased and the Guardsmen returned to the area of the ROTC building.

* * * *

Governor Rhodes, pursuant to both federal and state law, had appointed General Del Corso, a distinguished Regular Army career officer with a wide military background, to the office of Adjutant General (A. 2349-53). Under Ohio law, the Adjutant General is the chief of staff and administrative head of the Ohio National Guard. Duties of training Ohio National Guardsmen were given to and carried out by the office of the Adjutant General (A. 2680). Governor Rhodes testified without contradiction that he received reports from the Adjutant General concerning riot duty training of the National Guard, and that he had been told by a representative of the United States Department of Defense that the Ohio National Guard was doing one of the fine jobs of riot control (A. 2681-2).

III. The Jury's Verdict for Defendants, the District Court's Judgment and the Decision of the Court of Appeals.

The defendants had moved for a directed verdict at the conclusion of the plaintiffs' proof and at the conclusion of all proof. Those motions were denied and the case was sent to the jury.

The parties below had stipulated that the jury would consist of twelve members and that a vote of nine jurors would be required to reach a verdict. After five days of deliberation, the jury returned a verdict in favor of all defendants by a nine-to-three vote.[3] Plaintiffs filed a mo-

[3] Near the end of the trial it was reported to the District Judge that one juror had been threatened three times and assaulted on one occasion. The District Court's response to this problem, which the Court of Appeals later held to be inadequate, is described in detail in the companion Petition for Certiorari (*Del Corso* v. *Krause*) to which we respectfully invite the Court's attention.

tion for new trial on all issues and a motion for judgment notwithstanding the verdict on the issue of unlawful dispersal. Those motions were denied by the District Court, which thereupon entered judgment on the verdicts in favor of the defendants (App. A46-A48). Plaintiffs appealed to the Court of Appeals for the Sixth Circuit.

The Court of Appeals grouped the claimed errors into five categories: "(1) lack of substantial evidence to support the verdict, (2) violation of First Amendment rights as a matter of law, (3) numerous errors in evidentiary and procedural rulings of the district court, (4) failure to deal properly with extraneous influences on the jury and (5) errors in the court's charge to the jury." (App. A3).

The Court of Appeals reversed the judgment and directed a new trial, on the sole ground that the trial court had failed to deal properly with extraneous influences on the jury:

> ". . . [T]he verdict was returned by a jury, at least one of whose members had been threatened and assaulted during the trial by a person interested in its outcome." (App. A3)

The Court of Appeals found no other errors prejudicial to plaintiffs. It expressly held that the verdict in defendants' favor was supported by substantial evidence (App. A19); it held also that *defendants* were entitled to a *directed* verdict on the First Amendment claims:

> "In view of the uncontradicted evidence that violence accompanied assemblies of students and young people for three consecutive days in Kent and on the campus, finally subsiding at about 3:00 a.m. on May 4th, the order banning assemblies on that day did not violate the First Amendment. * * * The motion for directed verdict on the separate claims for damages

for violation of the right of peaceable assembly should have been granted. Upon another trial this claim will not be an issue." (App. A16)

In ruling on the District Court's instructions, the Court held also that the plaintiffs were not entitled to go to the jury on the theory that they had been subjected to cruel and unusual punishment in violation of the Eighth Amendment:

> "One aspect of the district court's charge appears to conflict with a recent Supreme Court ruling. In the present cases the court instructed the jury that it could find for the plaintiffs under their § 1983 claim if the action of the defendants constituted cruel and unusual punishment as proscribed by the Eighth Amendment. In *Ingraham* v. *Wright*, [430] U.S. [651], 45 U.S.L.W. 4364 (April 19, 1977), the Court held that the Eighth Amendment was designed to protect those convicted of crimes. Where a state seeks to punish without an adjudication of guilt, 'the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.' [430 U.S. at 672, n.40.] Upon another trial separate instructions on cruel and unusual punishment should not be given." (App. A17)

The Court rejected the defendants' contention that *Gilligan* v. *Morgan*, 413 U.S. 1 (a prior action arising out of the Kent State incident, but which sought only declaratory and injunctive relief), precluded the Court from submitting to the jury issues relating to "training, weaponry and orders of the Ohio National Guard". The Court said:

> "It was for the jury to determine whether the Ohio orders and regulations, particularly with respect to use of loaded weapons in dealing with civil disturbances, represented a departure from Army regulations. If such a departure was found to exist, it was a factor to be considered in deciding the ultimate issues of liability in these cases. A justiciable controversy related to training, weaponry and orders was presented." (App. A18)

The Court of Appeals rejected all of plaintiffs' other objections to the trial court's charge to the jury and to its evidentiary and procedural rulings. The defendants filed petitions for rehearing with suggestions for rehearing en banc. These petitions were denied with three judges dissenting from the denial of en banc consideration (see App. A36). Judge Weick wrote a dissenting opinion, wherein he stated:

> "This is one of the most important cases ever to come before this Court for determination. It surely merited en banc consideration." (App. A37)

Judge Weick devoted the major portion of his opinion to the individual liability of Governor Rhodes, concluding that "the Governor was entitled to a directed verdict." (App. A38). Addressing himself to this Court's opinion in *Scheuer*, he observed that this Court had held only "that the District Court acted *prematurely* in dismissing the complaint and that it should have taken some evidence" (App. A40, emphasis in original), and he added that although "the plaintiffs have been fully heard" there "was not an iota of evidence offered at the trial to support" their allegations as described in this Court's quotation from their complaints.[4] (App. A42).

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[4] Judge Weick also determined that the panel had erred in its consideration of the jury issue, and should have remanded for an evidentiary hearing on the question of jury tampering, rather than directing a new trial. (App. A44-A45).

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS UNDER 42 U.S.C. § 1983 IN A MANNER WHICH APPEARS TO BE INCONSISTENT WITH DECISIONS OF THIS COURT; IF THE QUESTIONS ARE OPEN THEY SHOULD BE DECIDED NOW.

I. The Use of "Excessive Force" in Attempting to Deal with a Civil Disturbance Does Not Constitute a Denial of Due Process Remediable Under 42 U.S.C. § 1983.

The Court of Appeals directed dismissal of plaintiffs' claims under 42 U.S.C. § 1983 insofar as they rest on an asserted denial of their rights under the First and Eighth Amendments. Nevertheless, the Court held that they were entitled to a new trial to determine whether they—or their decedents—had been deprived of life, liberty or property without due process of law. According to the Court of Appeals, the question for retrial is:

> "whether excessive force was employed in attempting to deal with a civil disturbance. Both the due process claims and the pendent state claims are concerned with the basic issue of the appropriateness of the response of state officials and National Guard members to the conditions which existed and developed at the May 4th noon assembly on the Kent State Campus." (App. A20)

We submit that the Court below erred in holding that the use of excessive force to quell a civil disturbance gives rise to a Due Process claim. The Court correctly held that *Ingraham* v. *Wright*, 430 U.S. 651, precludes plaintiffs from relying on the Eighth Amendment, which "was designed to protect those convicted of crimes" (App. A17). The Guardsmen plainly were not seeking to punish the students for crimes; rather, they were attempting to disperse an unlawful assembly and to prevent the commission of crimes. But while the court below correctly

stated that "[w]here a state seeks to punish without an adjudication of guilt, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment (quoting *Ingraham*, 430 U.S. at 672, n.40), that holding does not aid plaintiffs here, because the defendants did not seek "to impose punishment" on them at all.

We of course do not contend that the Due Process Clause is implicated only when the state deprives a person of life, liberty or property in the course of *punishing* that person—the reach of that Clause is much broader. But it is likewise clear that the Clause does not reach all conduct by the state or its employees which deprives an individual of life, liberty or property. The recent precedent in point is not *Ingraham*, but *Paul* v. *Davis*, 424 U.S. 693, where the Court rejected the contention "that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend * * * a right to be free of injury wherever the State may be characterized as the tortfeasor." (*Id.* at 701).

The Court reasoned:

> "* * * such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law. *Griffin* v. *Breckenridge*, 403 U.S. 88, 101, 102 (1971); *a fortiori* the procedural guarantees of the Due Process Clause cannot be the source for such law." (424 U.S. at 701).

Indeed, the *Paul* opinion appears to have anticipated the precise problem in this case:

> "If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a par-

ticular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983." (424 U.S. at 698).

Even as mistaken or negligent shooting does not give rise to a "Due Process" claim, neither does an allegation that peace officers used "excessive force" bring into play "the procedural guarantees of the Due Process Clause" (*id.* at 701). Such misconduct simply has nothing to do with the *procedural* guarantees of the Fifth and Fourteenth Amendments. On this point, too, the court below misread *Ingraham* v. *Wright*, for the issue which this Court decided under the Due Process Clause was not whether the paddling of students was "excessive", but whether some kind of hearing was required before corporal punishment was inflicted. Unlike the petitioners in *Ingraham*, plaintiffs here do not claim that they were entitled to some kind of hearing before the Guardsmen fired; it is precisely because any such requirement would be incongruous in this context that the Due Process Clause has nothing to do with plaintiffs' claim.[5]

We submit that certiorari should be granted to achieve compliance with the *Paul* precedent, to eliminate confusion concerning the meaning of *Ingraham*, and to obviate the necessity of another trial on plaintiffs' federal claims. Moreover, if *Paul* left open the question whether the use of "excessive force" in stopping the commission of an offense is a Due Process violation actionable under § 1983, that question should be settled now. For the federal courts to entertain such actions, and establish standards of "excessiveness" in the performance of this basic police function, would cut deeply into state prerogatives, contrary to the principle of Federalism which governed decision in *Paul* and in *Rizzo* v. *Goode*, 423 U.S. 362.

[5] If an analogy were to be drawn between plaintiffs' situation and the school context of *Ingraham*, the truly parallel situation would be the forceful intervention by one or more teachers in a fight between students or a similar disturbance; nothing in this Court's opinion or those of the dissenting Justices suggests that a Due Process question would arise under those circumstances.

It is precisely these considerations which led the Second Circuit to reject the claim that "a civil rights action lies, under 42 U.S.C. § 1983, against a police officer who, in the course of his duty, shoots and kills a person who has committed a felony and is trying to escape arrest." *Jones* v. *Marshall*, 528 F.2d 132, 133 (C.A. 2). The Court declined to allow such an action, even where the escapee's crime "did not involve conduct threatening use of deadly force" and there was not, "at the time of the shooting substantial risk that the person fleeing arrest would cause death or serious bodily harm to anyone if his apprehension were delayed." *Id.*[6]

A majority of the Eighth Circuit took the opposite view in *Mattis* v. *Schnorr*, 547 F.2d 1007 (C.A. 8, en banc, 4-3 decision), which was vacated and remanded by

[6] In a thoughtful opinion, which was plainly sympathetic to the plaintiffs' objections to the State's rule that the use of deadly force was privileged, Judge Oakes wrote:

> "Here we are dealing with competing interests of society of the very highest rank—interests in protecting human life against unwarranted invasion, and in promoting peaceable surrender to the exertion of law enforcement authority. The balance that has been struck to date is very likely not the best one that can be. In an area where any balance is imperfect, however, there must be some room under § 1983 for different views to prevail." (528 F.2d at 142).

this Court because there was no case or controversy, *Ashcroft* v. *Mattis*, 431 U.S. 171. If there is a difference between the issue in this case and that in *Jones* and *Mattis*, it is that the State's interest is even greater in stopping the commission of an offense than in apprehending an escapee; by a parity of reasoning it is all the less appropriate for the federal courts to compel adherence to their views of policy on the permissible degree of force "employed in attempting to deal with a civil disturbance" (App. A20) or other offense in progress.

II. On This Record Governor Rhodes Is Entitled to Judgment.

In the initial paragraphs of its opinion, the Court of Appeals noted that this Court, in *Scheuer*, had "discussed the doctrine of executive immunity and its application in actions based on 42 U.S.C. § 1983 where it is claimed that state officials have misused power which they possess by reason of positions which clothe them with the authority of state law." But the Court of Appeals did not elaborate on that standard or discuss the specific immunity issues which this Court defined in *Scheuer*: "whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared." (416 U.S. at 250).

Scheuer held that those issues could not be resolved on the pleadings; but the converse of that holding was that if those issues were resolved in the Governor's favor he would be immune from liability. The Court of Appeals therefore had the duty, before subjecting the Governor to a second trial, to consider whether the plaintiffs had presented sufficient evidence to create a jury question against the Governor on any of the foregoing theories

of liability. We submit that if the Court of Appeals had undertaken that task it necessarily would have concluded that the Governor is entitled to dismissal.

Plaintiffs' concession that the Governor's call-up of the National Guard to assist civilian authorities in the City of Kent was justified (see p. 7, *supra*) takes out of the case any claim of liability for "proclaiming an emergency" (416 U.S. at 250). Turning to "the actions taken to cope with the emergency so declared" (*id.*), the decision to ban campus assemblies is removed as a basis for liability by the Court of Appeals' conclusion that this order was constitutional. And, of course, the Governor did not direct the deployment of the National Guardsmen when they appeared on campus to disperse the crowd or give the order to lock and load weapons (see p. 9, *supra*). Thus, no question of his authority, discretion or good faith with respect to those actions arises.

In sum, as Judge Weick observed below, "there was not an iota of evidence offered at the trial to support" the allegations of the complaints which were reinstated in *Scheuer* (A42). The majority's direction of a new trial without even addressing the question of the Governor's personal liability deprives him of an important benefit of his *Scheuer* immunity.[7] It is also, we submit, a

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[7] The Court below dealt with the individual liability of only one defendant:

> "The defendant White, president of Kent State, had no control over the actions of the National Guard. Since his participation in the decision to ban the May 4 assembly did not violate rights of the plaintiffs, there is no theory under which he could have been liable to the plaintiffs. Upon remand the district court will dismiss all claims against this defendant." (App. A16)

The Governor had "control over the actions of the National Guard" on the day of the shooting only in the sense that, as its Commander-in-Chief, he had legal authority to direct those actions. But to predicate liability against him on that theory—which the Court of Appeals did not articulate—would potentially subject all governors to liability for the constitutional violations of their subordinate officers. See pp. 20-21, *infra*.

serious neglect of the Court of Appeals' responsibilities: While 42 U.S.C. § 1983 renders high state officers answerable in federal courts, those courts should not permit actions against them to be maintained after the plaintiffs have had the opportunity to establish facts to defeat their immunity, but have failed to do so; due regard for the interests of the officers, and of the State they serve, requires that interference with the defendants' performance of their official duties be thus minimized. This Court should review the Court of Appeals' refusal to dismiss the claims against the Governor because the decision below disserves the interests of Federalism and is inconsistent with the law of the case as established in *Scheuer*.

The decision below should be reviewed also because of its great importance in the development of the law under 42 U.S.C. § 1983. When this case was first here, the Court said:

> "These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here." (416 U.S. at 249).

Now, however, there has been a full-blown trial of fifteen weeks duration. Thus, if an argument can be made that what was already decided in *Scheuer* is insufficient to establish the Governor's immunity, this case offers an unusually informative record for elaboration of the principles declared in *Scheuer*. It is a question of great and recurring significance whether, and, if so, under what circumstances, liability under § 1983 can be imposed on the highest official in the chain of executive authority—be it the Governor of a State or Mayor of a City. Such an official is an attractive and obvious target in any action under § 1983 for constitutional violations by any of his subordinates, who will often be judgment proof.

The question is squarely presented on this record. The Court of Appeals' divergent treatment of Governor Rhodes and Kent State University's President White can be explained, if at all, only on the theory that the Governor's position gave him control over the actions of the National Guard, see p. 19, n.7, *supra*. Yet the Governor neither "direct[ed], participate[d] in, or approve[d]" the shootings which are the basis for plaintiffs' claims. Cf. *Ford* v. *Byrd*, 544 F.2d 194 (C.A. 5). As one commentator has observed:

> "The doctrine of respondeat superior has been held generally inapplicable to the section 1983 action;[103] and most courts have been unsympathetic to the claim that higher level officers have a general duty to the public to supervise, correct, and control the actions of their subordinates.[104]"

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[103] *See, e.g.*, Navarette v. Enomoto, 536 F.2d 277, 282 (9th Cir. 1976), *cert. granted*, 97 S. Ct. 783 (1977); Jennings v. Davis, 476 F.2d 1271, 1274-75 (8th Cir. 1973); Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). *But see* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971) (respondeat superior applicable in § 1983 action if provided for by state law); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955) (same).

[104] *See, e.g.*, Ford v. Byrd, 544 F.2d 194 (5th Cir. 1976); Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974); Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); Delaney v. Dias, 415 F. Supp. 1351 (D. Mass. 1976); Ammlung v. City of Chester, 355 F. Supp. 1300 (E.D. Pa. 1973), *aff'd*, 494 F.2d 811 (3d Cir. 1974). *But see* Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976) (supervisory liability available for personal participation, breach of state law duty; notice of past culpable conduct and failure to prevent recurrence); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1972) (supervisors liable for negligent failure to train subordinates), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973)." [8]

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[8] Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1207 (1977).

Thus, by requiring the Governor to stand trial again despite this record, the Court of Appeals has decided an important federal question in a manner which is inconsistent with the prevailing rule in the Courts of Appeals. For this reason, also, certiorari should be granted.[9]

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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[9] The issue of supervisory responsibility under § 1983 is presently before the Court in *Procunier* v. *Navarette*, No. 76-446, which was argued on Oct. 11, 1977.

With respect to questions 3(a) and (b) raised by this Petition we rely on the statement of Reasons for Granting the Writ with respect to the juror issues in the companion Petition, *Del Corso* v. *Krause*.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part as follows:

> "* * * nor shall any person be deprived of life, liberty, or property without due process of law; * * *"

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part as follows:

> "Section 1: * * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Supreme Court of the United States

October Term, 1977

Nos. 77-1017

JAMES A. RHODES,
Petitioner,

vs.

ARTHUR KRAUSE, *et al.*,
Respondents.

SYLVESTER DEL CORSO, *et al.*,
Petitioners,

vs.

ARTHUR KRAUSE, *et al.*,
Respondents.

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OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 12, 1977)

No. 76-1095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs-Appellants,

v.

JAMES A. RHODES, *et al.*,
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: PHILLIPS, *Chief Judge;* EDWARDS and LIVELY, *Circuit Judges.*

LIVELY, *Circuit Judge,* delivered the opinion of the Court, in which PHILLIPS, *Chief Judge,* and EDWARDS, *Circuit Judge,* joined. EDWARDS, *Circuit Judge* (pp. 31-33) also delivered a separate concurring opinion.

LIVELY, *Circuit Judge.* In these consolidated cases damages were sought by nine persons injured and the personal representatives of four persons who were killed at Kent State University on May 4, 1970. The defendants were the Governor of Ohio, the president of the university

and various officers and enlisted members of the Ohio National Guard. After a trial which lasted approximately 15 weeks the jury returned a verdict for all defendants and the plaintiffs have appealed.

This is the second appeal in the present case. In *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the Supreme Court reversed this court's affirmance of a judgment dismissing the complaints on grounds that the defendants were entitled to immunity by reason of their official positions and that the Eleventh Amendment barred an action against the State of Ohio. The Supreme Court held that the complaints stated claims upon which relief may be granted and that the actions are not barred by the Eleventh Amendment. In its opinion the Supreme Court discussed the doctrine of executive immunity and its application in actions based on 42 U.S.C. § 1983 where it is claimed that state officials have misused power which they possess by reason of positions which clothe them with the authority of state law. In remanding the cases the Supreme Court defined the issues and the actions required of the trial court as follows:

> The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings,

> either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint. 416 U.S. at 250

These cases have been exhaustively briefed and they were fully argued. Though many specific errors are claimed by the plaintiffs, they may fairly be grouped into five categories: (1) lack of substantial evidence to support the verdict, (2) violation of First Amendment rights as a matter of law, (3) numerous errors in evidentiary and procedural rulings of the district court, (4) failure to deal properly with extraneous influences on the jury and (5) errors in the court's charge to the jury. We conclude that the plaintiffs are entitled to a new trial because the verdict was returned by a jury, at least one of whose members had been threatened and assaulted during the trial by a person interested in its outcome. The other contentions of the appellants will be dealt with only as necessary to avoid error at another trial.

THE JURY ISSUE

The jury was not sequestered. Near the end of the trial it was reported to the district judge that one juror had been threatened three times and assaulted on one occasion. The threats were against both the juror and his family, and were related to the verdict in this case. The excerpts from the transcript which are appended hereto describe the problem and the steps taken by the district court.

Several facts require further comment. The district judge never interrogated the threatened juror to learn what effect the incidents had had on him and whether he had discussed the threats with other jurors. When

counsel for the plaintiffs requested that such an interrogation take place the court indicated that he would "take care of it"—apparently referring to his tentative decision at that time to excuse the threatened juror. Later the court stated that there was no need even to inquire of the juror since he was going to be excused anyway. In fact, however, the juror was never excused. Instead the entire jury was informed that an attempt had been made to influence its decision in the case, and the jury was eventually sequestered. In addressing the jury the judge referred to the extreme seriousness of the threats and the fact that he had "blood on his hands" because of failure to take a threat seriously at some earlier time. The court did not question the other jurors to determine whether any of them had been approached or whether the threatened juror had discussed the details of his experience with them.

During the proceedings in chambers from which we have quoted extensively in the appendix the district judge indicated several times that he had decided to excuse the threatened juror. After the court had delivered its charge to the jury counsel for plaintiffs asked if the court had elected not to excuse the threatened juror. The following dialogue occurred:

> THE COURT: [4029] I am electing not to excuse that juror.
>
> MR. KELNER: I assume none of the parties know who that juror is?
>
> THE COURT: Not from me, I have refused very adamantly to give anybody the slightest hint.
>
> MR. KELNER: In relation to our responsibility to our clients, I think opposing counsel as well, are there any different facts available to the Court relating to the ability of this juror to fulfill his duties

as a juror in deciding the case untrammeled by any further threats or any other details that we have not been provided with?

THE COURT: No. The situation is no different than it was at the time the matter was argued out. I simply took the position, after I reviewed the matter, there were many ways this man could react. He reacted in the proper manner, that is, called for help from the authorities that he could think at the moment for immediate help. If a fellow does that, that's an indication he is conscientiously trying to do the thing the right way.

I have a great belief in jurors and their ability to overcome [4030] any prejudicial things and to outweigh them when they know they have to do it.

I feel, even though he was approached and threatened something was going to happen, being assured that protection was forthcoming, he no longer has to consider that, and I am quite sure that he will be able to put these extraneous things out of his mind and decide the case on the basis of the law and the evidence.

I think it will be rather hard, in many ways, I think Mr. Fulton pointed this out, here is a guy who tried to do the right thing, after going through all the hell of this case, that automatically poisoned his mind and it wasn't his fault. I don't think it automatically poisoned anybody, so I am going to let him go. [Page numbers refer to Joint Appendix.]

The Supreme Court laid down the following rule in *Mattox v. United States*, 146 U.S. 140, 150 (1892):

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officers

> in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox was a capital case. However, this rule has been applied in both criminal and civil cases through the years. It does nothing more than establish the most fundamental requirement for successful employment of the jury system —that every litigant may have confidence that his case will be decided solely on the law and the evidence heard in the courtroom. Since trial by jury is guaranteed in both criminal and civil cases by the Sixth and Seventh Amendments to the Constitution, any unauthorized intrusion into the work of a jury is a threat to our entire system of justice.

In *Remmer v. United States,* 347 U.S. 227 (1954), the Court criticized the use of an FBI agent to interrogate a juror who had been approached by a third party during a criminal trial, stating:

> The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. *Id.* at 229-30.

After remanding the *Remmer* case for a hearing on whether the incident was harmful to the defendant, the Supreme Court ultimately ordered a new trial upon concluding that the evidence ". . . reveals such a state of facts that neither Mr. Smith [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror." *Remmer v. United States,* 350 U.S. 377, 381 (1956).

It was established in *Remmer, supra,* 347 U.S. at 229, that, at least in criminal cases, any outside contact with a juror about a pending case made during trial, is "presumptively prejudicial," and that the burden of establishing harmlessness "rests heavily" on the government. This presumption has been consistently recognized by this court. In *Stone v. United States,* 113 F.2d 70 (6th Cir. 1940), a case which involved an attempt to bribe a juror, the trial judge first interrogated the juror who had been approached, in chambers with a court reporter recording the proceedings. He then asked the remaining jurors, individually and under oath, whether they had been approached or any unusual events had occurred in connection with their service on the jury. The first juror stated that he had told no one else of the approach, that as far as he knew no other juror had been approached and that he was "open minded" and able to decide the case as if he had not been approached. All the remaining jurors stated that they had not been contacted and that nothing unusual had occurred. Nevertheless, this court held that the presumption of prejudice had not been overcome since there was "no showing on the part of the appellee that no injury *could have occurred* by reason of the irregularity." *Id.* at 77-78 (emphasis added).

More recently we reached the same conclusion in *United States v. Ferguson,* 486 F.2d 968 (6th Cir. 1973), where the district judge made a commendable effort to avoid a mistrial. Referring to our earlier decision in *Stone, supra,* Judge William E. Miller wrote for the court,

> We reversed on the basis that once an improper communication has been made to a juror, there is a presumption that the rights of the defendant are prejudiced. *See* Mattox v. United States, 146 U.S. 140, 13 S.Ct. 150, 36 L.Ed. 917 (1892). The burden

was on the government to show that no prejudice resulted from the communication. Our insistence on this high standard was necessary, not only to insure that the defendant received a fair trial by impartial jurors, but also to maintain the integrity of the jury system. Inherent in our scheme of justice is the assumption that litigants will have faith in the probity of jury verdicts. Absent such faith the stability on which we depend for the orderly functioning of our legal institutions would be in doubt. *Id.* at 971.

The presumption that extraneous communications with jurors are prejudicial has also been applied in civil cases. In *Stiles v. Lawrie,* 211 F.2d 188 (6th Cir. 1954), the judgment in an F.E.L.A. case was reversed for a new trial because the jury considered material which had not been received in evidence. Applying a rebuttable presumption of prejudice the court found that it was impossible for the district judge or the court of appeals to know whether the extraneous material actually influenced the verdict. The test of harmlessness was stated as follows:

> Receiving incompetent documents by a jury requires that the verdict be set aside, unless entirely devoid of any proven influence *or probability of such influence* upon the jury's deliberations or verdict. *Id.* at 190 (emphasis added.)

A similar test was enunciated in a civil antitrust action where the district court had held a full hearing on an allegation of extraneous influences on a jury. The court of appeals in *Paramount Film Distributing Corp. v. Applebaum,* 217 F.2d 101, 105-06 (5th Cir. 1954), *cert. denied,* 349 U.S. 961 (1955), concluded:

> The solution of this question does not require a positive finding that the jury was actually influenced by what

> took place; but rather involves a determination as to whether or not it was made reasonably certain that they were not.

We can perceive of no reason to apply a less rigid requirement to this case, where the extraneous influence consisted of threats on the life of a juror and his family, accompanied by a physical assault. The defendants' argument that there is no evidence that the jury was affected by fear or coercion misconceives the established law and ignores the presumption of prejudice. The record is completely barren of any showing that the verdict was not affected by an extremely serious extraneous intrusion. Under these circumstances, the party seeking to avoid a new trial has the burden of showing the entire absence of any influence on the verdict or the probability that such influence existed. *Stiles v. Lawrie, supra.* Counsel for the defendants objected to dismissing the threatened juror and made no request for a hearing which might have thrown further light on the circumstances of the threat and assault and its probable effect on the other jurors.

The cases relied upon by the defendants are readily distinguishable. *Womble v. J. C. Penney Co.,* 431 F.2d 985 (6th Cir. 1970), did not involve an extraneous influence. This was a specific finding of the district court, affirmed by the court of appeals. Under the circumstances of that case there was no abuse of discretion in denying a motion for a new trial. In *Gault v. Poor Sisters of St. Francis,* 375 F.2d 539, 551 (6th Cir. 1967), the court concluded that there was no showing of "extraneous influences brought into the jury room from outside [citing *Mattox, supra*] . . . or any improper approach to or communication with the jury prior to or during the course of its deliberations by some outsider." Similarly, in *Stephens v. City of Dayton,*

474 F.2d 997 (6th Cir. 1973), there was a finding of no extraneous influences. Obviously none of these cases provides guidance in the present case, where a most serious extraneous influence was brought to bear on at least one juror. This case is controlled, rather, by the doctrine of *Mattox v. United States, supra,* as applied by this court in civil as well as criminal cases.

The defendants argue that the plaintiffs did not object to the district court's decision to permit the threatened juror to remain on the jury. An examination of the transcript makes it clear that counsel for the plantiffs repeatedly requested that the threatened juror be excused. Rule 46, Fed. R. Civ. P. provides:

Rule 46.

EXCEPTIONS UNNECESSARY

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

The transcript reveals that the district judge knew that the plaintiffs had requested that the threatened juror be excused. Furthermore, the trial judge repeatedly indicated that the juror would be excused, and that there would be no point in questioning since he could not be permitted to participate in the deliberations.

Every litigant is entitled to a verdict which is free of improper influences. It was error for the trial court to determine *ex parte* and without any personal interrogation that a juror who had been threatened and assaulted and told that his home would be blown up could continue to serve, unaffected by these incidents. The threatened juror should have been questioned by the court to hear his version of the reported incidents and to learn whether he had discussed them with other jurors, including the possibility that he had disclosed the way in which his assailant was attempting to cause him to vote. Unless counsel agreed to an *in camera* interrogation, they were entitled to be present and a record should have been made of the proceedings. *Remmer v. United States, supra,* 374 U.S. at 229-30; *United States v. Gay,* 522 F.2d 429, 435 (6th Cir. 1975). Unless the court was completely satisfied after questioning him that there was no probability that the threatened juror would be affected in the performance of his duties, that juror should have been excused. As the court stated in *Stone v. United States, supra,* 113 F.2d at 77, "If a single juror is improperly influenced the verdict is as unfair as if all were. Further, if it appeared that any other jurors had been subjected indirectly to improper influences by reason of their knowledge of the threatened juror's experience the district court would be required to consider declaring a mistrial, lamentable as that would be. See *Briggs v. United States,* 221 F.2d 636, 639 (6th Cir. 1955). Here, no attempt was made to determine whether the remainder of the panel had possibly been contaminated. Instead, they were merely told that efforts had been made to influence one of their number, with alarming references to the extreme seriousness of the threats, and were left to speculate about the entire matter.

We have considered the possibility of remanding for a hearing on the question of whether the unlawful intrusion in this case was harmless, but have concluded that such a hearing would be pointless. If the threatened juror had been questioned immediately after the court was informed of the intrusion the district court might have been able to determine the extent of the probable influence of the incident on him, and acted accordingly. Likewise, if the remaining jurors had been questioned at that time, a basis would have existed for deciding whether they would probably be influenced. Even when the investigation is made immediately upon learning of an intrusion it is extremely difficult to learn the extent of the extraneous influence upon a jury. This difficulty is compounded if questioning is deferred, since it is not clear that a juror can be questioned after verdict except to determine whether an intrusion has occurred. The courts have not ruled uniformly on the question of whether a juror may be interrogated after a verdict is rendered as to the effect of extraneous influences on him. See *e.g., United States v. Remmer,* 122 F. Supp. 673, 675, n. 4 (D. Nev. 1954); *cf. United States v. Barfield,* 359 F.2d 120, 123 (5th Cir. 1966). This matter is not settled by Rule 606, Fed. R. Ev., since testimony concerning outside influences is treated as an exception to the general rule against a juror impeaching his verdict.

Even if questioning the jurors were permitted on the issue of whether the verdict was affected by the incidents, considering the problem of fading memories and natural reluctance of a juror to admit that he had been improperly influenced, we believe it would be impossible now for either the district judge or this court to conclude that the threat and assault disclosed by this record were harmless. *Cf. Stiles v. Lawrie, supra,* 211 F.2d at 190.

The intrusion in this case represents an attempt to pervert our system of justice at its very heart. No litigant should be required to accept the verdict of a jury which has been subjected to such an intrusion in the absence of a hearing and determination that no probability exists that the jury's deliberations or verdict would be affected. Although we are reluctant to do so, particularly in face of the obvious good faith efforts of the trial judge to deal with a most difficult problem which arose near the conclusion of an exhausting trial, we conclude that reversal for a new trial is required.

FIRST AMENDMENT CLAIMS

The plaintiffs contend that they were entitled to a directed verdict on their claim that the banning and dispersal of the assembly on the Kent State campus at noon on May 4, 1970 violated the right of peaceable assembly. In opening statements to the jury and in colloquy with the district court and opposing counsel it was admitted by attorneys for the plaintiffs that there had been violent assemblies in Kent and on the campus of Kent State on Friday, Saturday and Sunday nights, May 1, 2 and 3. Counsel conceded that Governor Rhodes had the right to call in the National Guard "because of the violence which had occurred, because it was unexcusable [sic], unjustifiable . . . ." It is admitted in the brief of the plaintiffs that students and other young people engaged in violence and vandalism in Kent, Ohio and on the campus during the three preceding days. On Saturday May 2nd the crowd burned the ROTC building on the campus and interfered with officers and firemen who attempted to control the fire. On Sunday May 3rd a crowd on the campus became disorderly and attempted to attack the university president's home. This crowd was finally dispersed by the National Guard after

it had left the campus and caused further damage in downtown Kent. Policemen, firemen and national guardsmen were repeatedly assaulted while attempting to maintain and restore order during the three-day period.

It is settled that violent demonstrations do not enjoy First Amendment protection. *Grayned v. City of Rockford,* 408 U.S. 104 (1972). Nevertheless the plaintiffs contend that an order banning the noon assembly on the campus on May 4, 1970, and attempts to disperse* that assembly before any violence occurred constitute a deprivation of their constitutional right to free expression which is distinct from their right not to be deprived of life or liberty without due process of law.

The plaintiffs' argument is based upon the faulty premise that the authorities had no right to ban or disperse the May 4 assembly in advance even though it was uncontradicted that similar group meetings in Kent, Ohio and on the campus of Kent State during the preceding three days had resulted in widespread violence and property damage. In their view "prior restraint" is never justified, and the authorities must always indulge the presumption that the next assembly will be peaceful, no matter how violent the preceding ones have been. That is not the law, particularly in a school or college setting. *Norton v. Discipline Committee of East Tennessee State University,* 419 F.2d 195, 199 (6th Cir. 1969), *cert. denied,* 399 U.S. 906 (1970); *Butts v. Dallas Independent School District,* 436 F.2d 728, 731 (5th Cir. 1971).

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*The actual orders to disperse the May 4th assembly were relayed to the crowd by a Kent State security officer, not by anyone connected with the National Guard. This officer rode back and forth in a jeep in the area where the crowd had gathered and ordered the dispersal, using a bullhorn. Rocks were immediately thrown from the crowd, at least one hitting the officer, and threats and obscenities were shouted at him.

The "clear and present danger" test for restricting freedom of expression or association is met when expression is directed to "inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969). While confirming the right of students to the freedom of expression guaranteed by the First Amendment, the Supreme Court in *Tinker v. Des Moines School District,* 393 U.S. 503, 513 (1969), noted this limitation:

> But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (citation omitted).

The Court elaborated on *Brandenburg* and *Tinker* in *Healy v. James,* 408 U.S. 169, 188-89 (1972), as follows:

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (unanimous *per curiam opinion*). See also *Scales v. United States,* 367 U.S., at 230-232; *Noto v. United States,* 367 U.S. 290, 298 (1961); *Yates v. United States,* 354 U.S. 298 (1957). In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent School District,* 393

> U.S., at 513. Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. (footnote omitted).

We conclude from the uncontradicted evidence of three successive days of violence involving students and other young people that the defendants satisfied the "heavy burden" of justifying their decision to permit no assemblies on the Kent State campus on May 4, 1970. *Healy v. James, supra,* 408 U.S. at 184.

The defendants made a motion for directed verdict on all issues at the conclusion of the plaintiffs' proof, and renewed it at the conclusion of all proof. In view of the uncontradicted evidence that violence accompanied assemblies of students and young people for three consecutive days in Kent and on the campus, finally subsiding at about 3:00 a.m. on May 4th, the order banning assemblies on that day did not violate the First Amendment. *Bright v. Nunn,* 448 F.2d 245, 249 (6th Cir. 1971). The motion for directed verdict on the separate claims for damages for violation of the right of peaceable assembly should have been granted. Upon another trial this claim will not be an issue.

The defendant White, president of Kent State, had no control over the actions of the National Guard. Since his participation in the decision to ban the May 4 assembly did not violate rights of the plaintiffs, there is no theory under which he could have been liable to the plaintiffs. Upon remand the district court will dismiss all claims against this defendant.

INSTRUCTIONS

Upon retrial the evidence and the issues presented may differ from those of the first trial. For this reason the plaintiffs' arguments concerning the jury charge at the first trial will not be considered in detail. However, we call attention to several questions which are likely to be raised concerning instructions at the second trial in order that error may be avoided.

One aspect of the district court's charge appears to conflict with a recent Supreme Court ruling. In the present cases the court instructed the jury that it could find for the plaintiffs under their § 1983 claim if the action of the defendants constituted cruel and unusual punishment as proscribed by the Eighth Amendment. In *Ingraham v. Wright,* ..... U.S. ....., 45 U.S.L.W. 4364 (April 19, 1977), the Court held that the Eighth Amendment was designed to protect those convicted of crimes. Where a state seeks to punish without an adjudication of guilt, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Id.* at 4369, n. 40. Upon another trial separate instructions on cruel and unusual punishment should not be given.

The defendants contend that no issues related to "training, weaponry and orders of the Ohio National Guard" should have been submitted to the jury. This argument is based on the Supreme Court's decision in *Gilligan v. Morgan,* 413 U.S. 1 (1973), where questions related to deployment of the Ohio National Guard at Kent State were held to present non-justiciable issues in an action seeking a declaratory judgment and injunction. In *Scheuer v. Rhodes, supra,* the Court noted the limited holding of that case in the following language:

> *Gilligan v. Morgan,* by no means indicates a contrary result. Indeed, there we specifically noted that

we neither held nor implied "that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." 413 U.S., at 11-12. (Footnote omitted.) 416 U.S. at 249.

Article I, § 8, cl. 16 of the Constitution grants to Congress authority "[t]o provide for organizing, arming, and disciplining . . ." the militia and reserves to the states the appointment of officers and authority for training the militia "according to the discipline prescribed by Congress." The Department of the Army, by delegation from Congress, has prescribed rules and regulations pertaining to training, weaponry and orders of the National Guard. There was voluminous evidence in this case from which a comparison could be made between the procedures prescribed by Congress and those ordered and practiced by the Ohio National Guard. It was for the jury to determine whether the Ohio orders and regulations, particularly with respect to use of loaded weapons in dealing with civil disturbances, represented a departure from Army regulations. If such a departure was found to exist, it was a factor to be considered in deciding the ultimate issues of liability in these cases. A justiciable controversy related to training, weaponry and orders was presented.

We have examined the entire charge to the jury and are impressed with the apparent effort of the district court to arrange the issues logically and to present them with clarity. The plaintiffs contend that the charge was "incredibly long and complex." The length and complexity of the instructions resulted, at least in part, from the fact that the plaintiffs sought damages under several different theories, requiring the court to state the law ap-

plicable to each claim separately with regard to each legal theory. The plaintiffs made an eleventh-hour motion to dismiss the pendent state claims with prejudice. Since proof had been completed and the court had distributed proposed instructions which included law related to the pendent claims, this motion was denied. If such a motion is timely made upon remand, the length and complexity of the instructions will be materially reduced.

Numerous specific requests for instructions were covered in the district court's charge, though not in the precise form or language requested. The court is not required to adopt the language of the requesting party if the substance of the requested charges is contained in the instructions actually given. *Womble v. J. C. Penney Co., supra,* 431 F.2d at 988. At the next trial the court will reexamine all requests for instructions in light of the proceedings before it and controlling authority.

OTHER ISSUES

There was sharp conflict in the evidence concerning events after the National Guard began its efforts to disperse the May 4th noon assembly. Neither the plaintiffs nor the defendants were entitled to a directed verdict on the due process and pendent state claims. Jury issues were presented and it cannot be said that the verdict was not supported by substantial evidence. This is not to intimate any conclusion if a similar contention is raised at the second trial, as the evidence may be materially different.

It is unlikely that the alleged trial errors will occur at another trial. Many questions will be controlled by the Federal Rules of Evidence, which became effective midway through the first trial. The applicability of the Rules will doubtless eliminate some of the controversies over trial rulings which marked the earlier proceedings.

These cases essentially present the question of whether excessive force was employed in attempting to deal with a civil disturbance. Both the due process claims and the pendent state claims are concerned with the basic issue of the appropriateness of the response of state officials and National Guard members to the conditions which existed and developed at the May 4th noon assembly on the Kent State campus. The tragic results of that confrontation are well known. The question of legal liability must still be resolved. With the First and Eighth Amendment claims eliminated the second trial will focus on the decisive issues related to the due process requirements of the Fourteenth Amendment and substantive law of Ohio. That trial should be less complicated and should present more clearly defined issues than the first.

The judgment of the district court is reversed and the consolidated cases are remanded for a new trial consistent with this decision. The plaintiffs will recover their costs on appeal from the defendants other than Robert White. The district court will enter an order dismissing all claims against the defendant Robert White, who will recover his costs on appeal from the plaintiffs.

APPENDIX TO OPINION

[3684]

MORNING SESSION
Wednesday, August 20, 1975
9:13 o'clock a.m.

(THEREUPON, the following proceedings were had in chambers, in the presence of the Court, counsel for the respective parties, and also present were Robert G. Wagner, United States Marshal, and Frederick M. Coleman, United States Attorney:)

THE COURT: . . . [3686] I find that at least one of the jurors has been approached on several occasions and threatened and actually physically assaulted in connection with the threats; threats have been made on his family, if he doesn't bring in a verdict in a certain way.

Now, I think there is still some possibility that, at the present time—this came to a head late last night and since then the Marshal's service has put the man under guard, the FBI is launching an investigation, and we have some hopes, according to Mr. Coleman, that if we can keep this thing quiet enough that the offense may be repeated, and if it were, with the juror under proper surveillance, the offenders can be apprehended.

. . .

[3687] . . . I certainly don't want anything that we do to hamper their efforts, because there is nothing more damaging to the justice system than to have people be able to attack the integrity of the judicial process, which is what has been done here.

Now, the thing that is bothersome about this, that we can't solve that problem just by excusing that one juror. The difficulty with doing that is, if these people are really serious, then they will shift their attention to some of the other jurors. We have no way of knowing that they have put out some feelers to the other jurors, but the other jurors may have not attached any significance to the preliminary approaches. This juror didn't pay attention the first time, it was only when repeated attempts were made and physical assaults were made on him that he thought there was something serious here and reported it to the authorities.

It appears to the United States Attorney and to me that under these circumstances, for the protection of the jurors, I don't [3688] have too much choice but to se-

quester them, because we don't have enough manpower locally to put all these jurors under guard and their families under guard. So that the only thing we can do is to sequester the jury.

Now, that sequestration of a jury is a serious business and I don't want to do that unless counsel feel that that's the only thing we can do. . . . [C]ertainly we need all to discuss that matter and reach some consensus about it. . . .

* * * * *

THE COURT: This is the first moment anybody has heard about it. I have only been aware of it for about a half hour.

* * * * *

MR. KELNER: [3690] [for plaintiffs] . . . Coming back to this matter, Your Honor, may we know anything about the nature of the assault?

The reason I am asking it, sir—

THE COURT: No. The assault consisted that a person who approached this juror and made three approaches to him, on one of those approaches he grabbed the juror and pushed him back against the wall and told him that he better not find his verdict the wrong way from the way he wanted it to be found.

* * * * *

MR. KELNER: [3692] There is one more point I would like to raise, your Honor, and I am happy I don't know what the person who wanted this juror to vote one way or another, I'm glad I don't know which way it is meant.

Is it possible that that juror, with the normal human impulse to react against one who threatens him and assaults him, would tend to bend over backwards to vote the other way?

In that event, could that juror be properly interrogated by your Honor in the privacy of your chambers in order, perhaps, that would sway him on the proper deliberation from all of the evidence in view of the experience he has had?

I am concerned about that. . . . I don't care whether this juror is for me or against me. If he feels he has been swayed, I want him off.

* * * * *

THE COURT: [3695] At any rate, gentlemen, we are getting away from the problem with which I am primarily concerned.

The question of the effect on this juror is one that I can address myself to later on. That is not too consequential because we still have two alternates.

The thing that I am concerned with is what we are going to do to protect the rest of the jury.

* * * * *

MR. BROWN [for defendants] First of all, I assume the Court asked the juror not to discuss this with other jurors, to get them unduly alarmed? [3696]

THE COURT: I haven't spoken to the juror. The Marshal and I think FBI people are speaking to him and I assume they have asked him not to talk about it.

Is that right, Mr. Marshal Wagner?

MARSHAL WAGNER: Yes, sir. That was your desire and I relayed that information to the man.

MR. BROWN: Secondly, I think on the question of sequestration, the Court and counsel should look at what effect this threat had on this man. Obviously it had enough effect that he reported it to the Marshal, the Court or whoever he reported it to.

My basic philosophy is, frankly, that of the Court's. I am opposed to sequestration.

To me, it gives kind of a forced aura to deliberations and I don't like that.

Now, if it is a real, if any juror is in real danger, of course, I would certainly modify my position on that but, if not, I would be opposed to sequestration. [3697]

THE COURT: Well, I, of course, take the position that telephone threats may be one thing, but threats that are communicated face to face—I was trained in the idea that you do not ever take lightly a face-to-face threat.

If a fellow says he is going to kill somebody or somebody is going to kill him—there's at least one person dead because I didn't take such a threat as seriously as that.

MR. BROWN: Was this a death threat to this juror?

* * * * *

THE COURT: Yes.

MR. BROWN: I did not know that.

* * * * *

MARSHAL WAGNER: Threatened to blow up the house.

* * * * *

MR. KELNER: Now, Judge, I would like to know whether you would interrogate this [3698] juror to determine what if any effect this has on his ability to be fair-minded, in view of the fact that the obvious impulse would be for him to lean over backwards against the side that was trying to threaten him?

THE COURT: As I just said, Mr. Kelner, that is a matter that I will take care of and can take care of very easily. That isn't what is concerning and troubling me now.

What I am concerned now about is physically protecting the rest of the jury and physically protecting the integrity of this trial, throughout the remainder of it, and that's the thing that is, frankly, worrying me.

MR. ALLOWAY [for defendants]. Your Honor, I have shifted my thinking a couple of times during the course of this conference, and it just shifted away again. . . . I think if it is a threat as to blowing up a juror's house, the juror isn't going to feel very comfortable at being sequestered while his family is posed with the threat, and I would assume that sequestration [3699] isn't going to solve the problem.

. . . I don't think that sequestration is in any way necessary—to insure a fair and impartial verdict, as far as—

THE COURT: I don't think that is—I agree with you on that. I don't think—that is not what I am worrying about.

MR. ALLOWAY: [3700] I also don't think it is going to help as far as the threats to the jurors are concerned.

If they are threatening to blow up their houses, that is something entirely different and this isn't solved by sequestration.

MR. BLAKEMORE [for defendant White]: . . . I think the test should be that when in doubt you sequester. . . .

MR. ENGDAHL [for plaintiffs]: . . . I think it would be helpful for the rest of us if this is perfectly clear, that we have your specific order that we are not to discuss this matter in the presence of, the existence of this threat, with anyone, including our clients outside this room; is that correct?

THE COURT: That is right. That [3701] is right. Not even with your clients.

* * * * *

MR. ENGDAHL: And secondly, it does seem to me that the fact that one threat apparently has been made means that we are concerned not only with the particular substance of that one threat but the possibility of threats communicated to other jurors, and that is a risk that I think nothing but sequestration can deal with.

True, this one person may be better at home protecting their house, but that would leave everyone available to any other type of threat, which apparently seems to be a serious risk.

THE COURT: Yes. As I say, it is easy enough to solve the problem of that juror. I could just, I could simply discharge him and probably in view of all of the circumstances I should, without regard to anything else, but the thing that has disturbed me about that is that once he is gone so that the people who have threatened realize that they have accomplished nothing by that one, if they are as rough as [3702] they have shown themselves to be, are they going to stop there or are they going to go on? Are they going to go on then and pick the next one? That is the thing that I am concerned about and that is why I have turned my thoughts very reluctantly to the matter of a possible sequestration of the jury.

MR. BROWN: Just, Judge, to help me in my thinking, is the threat or threats by one person or by more than one person?

THE COURT: Marshal Wagner, you have more information on that than I do, and can you tell them what you told me about this matter so that counsel can hear what you said about your investigation on it so far?

MARSHAL WAGNER: So far, we do believe there is a witness to the actual assault. Man approached three different times in one day.

MR. BROWN: By one person?

MARSHAL WAGNER: By one person.

MR. BROWN: Well, that isn't quite as bad. Oh, it's bad—

* * * * *

MR. BROWN: [3703] Were the threats here in the area of the Courthouse or elsewhere?

MARSHAL WAGNER: One, in the area of the Courthouse.

MR. MANDEL [for plaintiffs]: If your Honor please, may I ask Mr. Coleman if he has contacted the FBI and instructed them to make an immediate investigation?

* * * * *

MR. COLEMAN: Okay. The information, Mr. Mandel, came first to my attention last night.

The facts with respect to the approach to the juror that I received from the agent are not as voluminous as those which Mr. Marshal [3704] has offered us. The agent, when he called me, had done nothing more than talk to this individual, the juror, who called him, and, of course, he was able to make a very limited interview over the telephone.

However, he did learn enough to know that the juror had been approached on two different occasions and he brought it to my attention.

* * * * *

THE COURT: [3706] . . . I have reached a tentative conclusion that it would be very difficult and also extremely hard on the jurors to put on an immediate order of sequestration.

So that I propose to discuss with the jurors, with counsel present, of course, but in the absence of all the public, that they should make preparations so that when they come back tomorrow morning they will have clothing and toothbrushes and things sufficient for some time and make their necessary family arrangements, and ask them to do that with the utmost of discretion in warning their families.

It is necessary not to tell anybody about this, because as long as they aren't sequestered they are available for threats or action.

[3707] Once we get them in and manage to keep this properly confidential, if we get them in sequestration, then, of course, they are safe. There is no use of making or carrying out threats if they are not going to be able to affect a juror, which they won't be once the jury is sequestered.

MR. KELNER: . . . Are you going to proceed on the assumption that they already know about the threats to that one juror?

I assume they already know about it. Are you going to assume they don't know about the threats, or are you going to discuss the subject of one juror being threatened?

THE COURT: If we reach the conclusion about going into sequestration, I am certainly going to tell the jury the reason why. Otherwise, the jurors might have uncharitable thoughts about it, which wouldn't help them in reaching a fair verdict. I want them to be sure that they understand that I am doing this not because counsel or I don't trust them, but because it appears to me to be essential for their own safety. [3708]

MR. KELNER: I think I would oppose that, Your Honor, for this reason:

I am thinking that might instill a sense of fear in the jury, and following the logic of it, we don't know which side was the subject of being favored by the threats. I think it might instill resentment in the entire jury, whoever threatened that juror wanting to threaten them one way might want the jury to think the other.

MR. BROWN: I am diametrically opposed to Mr. Kelner.

MR. KELNER: I have no way of knowing whether the juror favored one or the other. I don't want to guess at it.

I think, sir, that would certainly cause such a deep resentment, because of the inconvenience that it would

be instilling something more powerful than any 10 witnesses that testified in this case.

* * * * *

MR. BROWN: [3709] I have always been raised that candor is the best way out.

I think the Court can handle this very nicely. He doesn't have to overemphasize the nature of the threats. I would play it down, frankly, if I were the Court.

THE COURT: I am going to.

MR. BROWN: Just to tell the jury that they are being sequestered to insure nobody would be contacted, the Court and counsel have decided it would be best to sequester them.

MR. KELNER: I would offer an alternative proposal for you to consider, Your Honor.

I would offer the suggestion that the jury be told that we are at the conclusion of a very lengthy case with the many factors in it and in the Court's discretion and the Court's judgment, the jury be sequestered.

In many important criminal trials they are sequestered from the first day of the trial. I would be opposed to any discussion of the threats. It is going to magnify it. It may cause fears of retribution concerning their verdict after they go home, after [3710] they are discharged.

I say this is going to infect this jury with an intangible factor that either side can't measure.

I don't think it should be of any discussion, the whole threat business.

* * * * *

MR. KELNER: [3712] Judge, I'm opposed to that for the reason it is going to infect this entire jury with something that will preoccupy their minds; fears of threats, fears of retribution. It is going to be the subject of gossip

in the jury room. They are human, what else are they going to talk about.

. . .

I say, sir, this is going to be a mistake to tell them about the very serious threats about the possibility of danger to their families and their homes.

Your Honor, I think you can take very strong control of this matter by stating to the jury: Now that this case is nearing the end and there are many important factors for you to consider, we are going to sequester you.

I would take exception to anything else that is going to take over the minds of the jury with a factor that is going to be impossible for them to overcome.

The threats are going to be half of the [3713] factors in the scales when they go in to decide this case.

MR. BROWN: . . . I think we have 14 intelligent people up there who will do exactly what the Judge tells them. If you don't have that belief in the jury system, let's abandon the whole thing.

* * * * *

THE COURT: . . . [3716] [W]hat I'm going to do, with tremendous reluctance, I am going to sequester this jury and I am going to tell the jury exactly why I am sequestering them.

And I am going to let the chips fall where they may.

With respect to the one juror who has been the object of this matter, I feel that under all of the circumstances that it will be necessary to replace him with an alternate juror for deliberation and that will make him available to you, to the Government, for cooperation.

I shan't advise him of that, however, until I send the jury in to deliberate. In other words, in order that he is being excused at this stage of the game would raise

a lot of questions. If the jury appears to be in exactly the same shape and composition as it has been all the way along, that will certainly leave things so that the cooperation you will have, your agents will have a better opportunity to see if they can apprehend the people who [3717] approached him.

* * * * *

THE COURT: . . . [B]ut for the sake of the integrity of the record, I think I am going to have to excuse him. There is no use of my even inquiring about it, I am just going to have to excuse him when the jury gets ready to deliberate.

MR. BROWN: [3718] Let me take exception to that and state my reasons.

I am opposed to it because I do not feel that the Court has sufficient information that this would or this would not influence his verdict.

More importantly, if it happened once it can easily happen again. . . .

And this has concerned me throughout this trial with only four alternates. . . . Assume we wound up with 11 jurors, then what?

THE COURT: Again, I will cross that bridge when I come to it. . . .

MR. KELNER: [3719] . . . You say you are allowing this juror, who will be excused, to remain until the end of the prooftaking or the end of the summation or just what?

THE COURT: When I am ready to send the jury out to deliberate, at that point he will be let off. Otherwise, the jury will appear just as it has been appearing. No one from the outside will know that he is not going to be going in . . .

* * * * *

THE COURT: [3720] . . . I am not even going to tell him.

MR. FULTON [for defendants]: If the Court please, I want to join in an exception, because I know of no rule of law that says that merely because someone has received a threat, there have been threats against jurors, that this makes him incapable of being a juror.

We have already lost two jurors in this trial since the start. . . .

* * * * *

MR. FULTON: . . . There could well be other threats against other jurors and they have not come forward, just as I am sure there have been other threats against other people in this case who have kept silent and said nothing about it.

. . . [3721] [H]e . . . is being penalized for a purported threat against him when he, himself, has done the very thing we would expect a juror to do if this system is going to work.

. . . [H]ere is a man who says, "I have been threatened, I am willing to tell you the truth, I am here as a juror. Now what happens to me? I am penalized because I have the guts to come forward and say what has happened."

THE COURT: Well, Mr. Fulton, you have raised some thoughts that I hadn't had.

At any rate, since I don't intend to do anything about this matter for at least two days, the only thing I will say at the present time [3722] is that my decision to sequester is made.

As to what I will do about the particular juror who was threatened, I may, after I have had a chance to give further consideration to the arguments of counsel both pro and con, I will decide whether or not I will let him go in with the jury to deliberate.

MR. BROWN: I certainly endorse everything that Mr. Fulton said.

MR. ALLOWAY: May I express myself as supporting Mr. Fulton?

MR. KELNER: I will take exception to the entire threat situation being disclosed to the entire panel.

[Page numbers refer to Joint Appendix]

EDWARDS, *Circuit Judge*, concurring. I join fully in Judge Lively's opinion for the court.

However, I also find reversible error in the District Judge's comments to the jury pertaining to the threat to the one juror. It is hard to see how the jury as a whole could fail to feel threatened by the comments made to the jury from the bench. Granting the difficulties of the situation, the language the District Judge employed simply went too far.

In notifying the jury of his intention to sequester them, the District Judge said:

> I am very much troubled and disturbed by information that has come to my ears that threats have been made to at least one of your number in an attempt to influence your decision in this case.
>
> I was brought up in an old school that threats of the type that were made are not to be ignored and not to be taken lightly.
>
> There have been times when I have ignored such threats and I have blood on my hands and it is not easy to carry blood on your hands for ignoring things, and I don't propose to have it happen again if I can avoid it.
>
> What I am now saying to you, I must ask you to keep in the very strictest of confidence. You can't keep it in absolute confidence because you are going to have to go home and discuss it with your families at a later point today. But when you do discuss

it with them, I think you must emphasize to them that it is of vital importance to them that they do not breathe a word of what you tell them to anybody, under any circumstances whatever.

What I am going to have to do, and I do this with tremendous reluctance, I am going to have to arrange, when you come back tomorrow, for you to bring clothing and things so that you can stay and be under the protection of my Marshals and stay together until this case is finally concluded.

How long that will be, I don't know, because it is going to take you a long time, I realize, for your deliberations.

But you are going to have to stay and stay under my custody and be kept away entirely from the public until you have reached your decision in the case.

I am sorry about this, but as I say, threats have been made on the lives of one of your number and I have no assurance that we can solve it simply by getting rid of that one.

Maybe some of you others have been threatened and have passed it off or have not even realized, perhaps, it was a threat or an attempt to threaten. But obviously threats become idle once they can no longer be communicated to you.

In other words, there is no need, you can't make a threat if you can't get it through to the person that you expect to be influenced by it. And it is for that reason only that I am taking this step.

I had thought that I would never, under any circumstances, reach a point where I felt that a jury ought to be sequestered. You read it in the paper, it is done very frequently, particularly in criminal trials of great magnitude. I have always felt that,

to a considerable extent, an insult to the integrity of the jurors.

I am not now dealing with a matter of your integrity which I have no doubts about whatever. But I am dealing with threats, as I say, my experience leads me to believe that I ought not simply ignore.

And it is your safety with which I am concerned, not your integrity. I don't worry about your internal integrity, that I have confidence in. I know you can protect that. But I don't have enough Marshals and enough FBI people, agents, to keep you protected as you go about your daily business.

Now, the reason I am not saying that you have got to stay right here and now be under protection now, I think if you do follow my instructions not to breathe a hint of this to anybody, as I say, you will have to tell your families because you will have to make arrangements for them to be taken care of, and that sort of thing while you are staying as my unwilling guests. But if we ostensibly go through the same motions that we have been going through, I think that the threateners, whoever they are, will not change their tactics. They will continue to concentrate where they have been concentrating.

As to one of your members, at least, we can provide and will provide around-the-clock protection and surveillance and as a practical matter, also of law enforcement in making such threats, of course, it is a very serious crime.

But people can't be punished for crime unless they can be apprehended, and one of the hardest things in the world is to apprehend stinking cowards who go around making and carrying out threats.

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITIONS FOR REHEARING

(Filed October 20, 1977)

No. 76-1095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs-Appellants,

v.

JAMES A. RHODES, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: PHILLIPS, *Chief Judge;* EDWARDS and LIVELY, *Circuit Judges.*

The petitions for rehearing with suggestions of rehearing en banc filed by the defendants-appellees having come on for consideration, and of the Judges of this court who are in regular active service less than a majority having favored ordering consideration en banc (Judges Weick, Celebrezze and Peck favored rehearing en banc and Judge Weick has filed a separate dissent), the petitions for rehearing have been referred to the hearing panel.

Upon consideration of the petitions for rehearing the court concludes that the issues raised therein were fully considered upon submission and decision of the case.

Accordingly, the petitions for rehearing are denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

DISSENTING OPINION OF JUDGE WEICK

(Filed October 20, 1977)

No. 76-1095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs-Appellants,

vs.

JAMES A. RHODES, *et al.*,
Defendants-Appellees.

DISSENTING OPINION

WEICK, *Circuit Judge,* dissenting. Three of the seven active Judges of this Court, namely Circuit Judges Celebrezze, Peck and Weick, voted in favor of en banc consideration. Only one Judge in addition to the three-Judge panel, voted against en banc consideration.

This is one of the most important cases ever to come before this Court for determination. It surely merited en banc consideration. It involved *inter alia* the question of the individual liability of the State of Ohio's Chief Executive Officer, the Governor of the State, for damages resulting from his calling out the Ohio National Guard, at the request of the Mayor of the city of Kent, to suppress a riot occurring on the campus of Kent State University, during the continuance of which riot the R.O.T.C. building on the campus was destroyed by fire, and stores in the city of Kent were looted by the mob. The rioting, looting, and arson constituted felonies under Ohio law. Ohio Rev. Code §§ 2917.02, 2917.03, 2911.01, 2911.02, 2909.02, and 2909.03.

The jury returned a verdict in favor of all the defendants after a trial which lasted nearly three months, which defendants included all of the members of the Ohio National Guard, the Governor of Ohio, and the President of Kent State University.

A panel of this Court has reversed on the sole ground of alleged threats against and assault upon one of the jurors in the case.

It is the Governor's contention that the District Court erred in denying motions for a directed verdict which were made by him at the close of plaintiffs' evidence and renewed at the close of all of the evidence. As will be shown below, the Governor was entitled to a directed verdict.

Since the Governor was entitled as a matter of law to the direction of a verdict in his favor, any other errors of law occurring at the trial are harmless. The panel recognized this proposition of law when it held that a verdict should have been directed in favor of the President of Kent State University and entered judgment in his favor. The suit against the President of Kent State University was plainly frivolous. The supporting authorities for harmless error are:

Rule 61 Fed. R. Civ. P.

Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976).

L. & S. Enterprises v. Great American Ins. Co., 454 F.2d 457 (7th Cir. 1971).

Quick v. American Steel & Pump Corp., 397 F.2d 561 (2d Cir. 1968).

The Governor was requested, by proclamation of the Mayor of the city of Kent issued on May 2, 1970, two days before the incident complained of, to call out the

Ohio National Guard to suppress a riot, which proclamation read in part as follows:

> I, LeRoy M. Satrom, Mayor of the City of Kent, Ohio, pursuant to the power invested in me as the chief magisterial officer of this City do hereby request the assistance of the Ohio National Guard to assist the Police Department and other local law enforcement agencies in restoring law and order in the City of Kent and particularly in the area of Kent State University and its environs.
>
> Local law enforcement agencies can no longer cope with the situation and I instruct you to provide the necessary assistance to restore peace and order to our community.[1]

Even prior to that proclamation the County Prosecutor had obtained an injunction prohibiting assemblies within the city of Kent.

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1. Plaintiffs' counsel conceded at the trial that the Governor had the right to call out the National Guard. As well stated by the panel on page 12 of its slip opinion:

> In opening statements to the jury and in colloquy with the district court and opposing counsel it was admitted by attorneys for the plaintiffs that there had been violent assemblies in Kent and on the campus of Kent State on Friday, Saturday and Sunday nights, May 1, 2, and 3. Counsel conceded that Governor Rhodes had the right to call in the National Guard "because of the violence which had occurred, because it was unexcusable [sic], unjustifiable. . . ." It is admitted in the brief of the plaintiffs that students and other young people engaged in violence and vandalism in Kent, Ohio and on the campus during the three preceding days. On Saturday May 2nd the crowd burned the ROTC building on the campus and interfered with officers and firemen who attempted to control the fire. On Sunday May 3rd a crowd on the campus became disorderly and attempted to attack the university president's home. This crowd was finally dispersed by the National Guard after it had left the campus and caused further damage in downtown Kent. Policemen, firemen and national guardsmen were repeatedly assaulted while attempting to maintain and restore order during the three-day period.

The Governor did not act to suppress the riot until after the mob had destroyed by fire the R.O.T.C. building located on the campus and had looted stores in the city of Kent. The Governor was authorized to act under Ohio Revised Code §§ 5923.21 and 5923.23.

This case is unprecedented. There is no reported case wherein the Governor of a state has ever been held liable for calling out the militia to suppress a riot or insurrection, and no case where a Governor's liability has been submitted to a petit jury for determination.

The Supreme Court, in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), held that the District Court acted *prematurely* in dismissing the complaint and that it should have taken some evidence. The Court did not state that it had to be a full dress trial. The Court said on page 249:

> In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that "mob rule existed at Kent State University." There was no opportunity afforded petitioners to contest the facts assumed in that conclusion.

The Supreme Court further stated at page 250:

> Further proceedings, either by way of *summary judgment* or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint. (Emphasis added)

In other words, the Court did not direct a full dress trial, which, in the present case, lasted nearly three months, and the defendants are confronted with a second trial because of the panel's reversal of the judgment for the defendants.

But now the "complaining parties" have been fully heard. Without any question mob rule did in fact prevail, not only on the Kent State campus but also in downtown Kent where stores had been looted, and the police were unable to cope with the mob.

The Governor was not present on the campus at any time during the rioting and the shooting. The Guard was in charge of its officer members.

Assuming that some members of the Guard did use excessive force to suppress the riot, this would impose no liability on the absent Governor because the Guard was in the command of the Adjutant General or his representative officers; nor would the Governor be personally liable if the Guard had not been properly trained as this function was performed solely by the Federal Government. See *Gilligan v. Morgan*, 413 U.S. 1 (1973).

In *Moyer v. Peabody*, 212 U.S. 78 (1909) Mr. Justice Holmes, who wrote the opinion for the Court, stated at page 85:

> So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), Mr. Justice Hughes, in referring to the discretion vested in a Governor to determine whether an exigency existed requiring the militia, stated: "His decision to that effect is conclusive."

In *Scheuer v. Rhodes, supra*, the Supreme Court stated what the defendants were charged with, as follows:

> In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an *unnecessary deployment* of the Ohio National Guard on the Kent State campus and, *in the same manner, ordered* the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. (Emphasis added) (p. 235)

There was not an iota of evidence offered at the trial to support the above-quoted language of the Supreme Court, charged by the plaintiffs in their complaints.

In *Barr v. Matteo,* 360 U.S. 564 (1959), the Supreme Court, in an opinion written for the Court by Mr. Justice Harlan, held that the Acting Director of the Office of Rent Stabilization had absolute immunity in defense of a suit for alleged libel contained in a press release. The Court quoted with approval from an "admirably expressed" opinion of Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949).

Barr v. Matteo was recently followed by the Court of Appeals for the District of Columbia Circuit, and was held not to be eroded by recent decisions of the Supreme Court. *Expeditions Unlimited Acquatic Enterprises, Inc. v. Smithsonian Institution,* ..... F.2d ....., en banc (46 USLW 2156, 2157, decided Sept. 16, 1977).

In *Cunningham v. Ellington,* 323 F. Supp. 1072 (W.D. Tenn. 1971), a three-Judge Court, consisting of Judges Phillips, Bailey Brown and Robert McRae, Jr., dismissed a damage suit for wrongful death of a man who was shot by police who were investigating a robbery, and upheld the validity of a Tennessee statute declaratory of the common law authorizing the use of deadly force to effect an arrest of a felon fleeing from arrest.

That case was followed in another damage suit, *Beech v. Melancon,* 465 F.2d 425 (6th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973), in a per curiam opinion concurred in by Judges Edwards, McCree (in the result), and Kent.

These two cases were followed by this Court in *Wiley v. Memphis Police Dept.,* 548 F.2d 1247 (6th Cir. 1977), *cert. denied,* October 3, 1977.

In the present case, before any shots were fired by the Guard, the guardsmen were approached by a rock-throwing mob, who were uttering obscenities. A number of the members of the Guard testified that they were afraid for their lives. There is no evidence that any officer of the Guard issued an order to fire.

It seems to me that, in all fairness, if we are going to subject the Governor of Ohio to the ordeal of a second trial, when he has been absolved by a jury at the first trial, there should at least be some discussion of the basis for such action. There was no evidence that the Governor acted with malice.

In deciding whether to call out the militia the Governor and the Adjutant General certainly had the right to rely on the decisions of the Supreme Court which are cited above and which were in effect at the time. Subsequent decisions of the Supreme Court which may have imposed stricter standards and liability which did not theretofore exist, may not be retroactively applied without violation of due process under the Fifth Amendment. *Marks v. United States,* 430 U.S. 188 (1977). Neither Congress nor the federal courts may enact ex post facto laws.

One additional issue remains to be discussed, namely, the panel's treatment of "The Jury Issue."

It was the duty of the trial judge, when it was reported to him that an alleged threat and assault had been made on one of the jurors, immediately to interrogate that juror at a hearing, at which counsel for all of the parties would be present and would be permitted to participate. At such hearing the Court could have learned from the juror himself exactly what happened and whether he (the juror) had discussed the threats with other jurors. A record should have been made of the proceedings in order to assure appropriate appellate review. *Remmer v. United States,* 347 U.S. 227 (1954). There the Court said:

> We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless.

Neither does anyone know in the present case, because the District Judge never conducted a hearing. He never interrogated the juror. The Judge never questioned other jurors to learn whether they knew anything about it.

The juror had apparently reported the alleged incident to a United States Marshal, and he reported it to the FBI and to the Court. The FBI interviewed the juror but made no written report. The United States Attorney was also consulted. The Judge indicated to counsel that he would excuse the juror but he never did excuse him. The Judge also reported the incident to the entire jury in open court. The FBI apparently decided to do nothing about it, which leads to the inference that the alleged threat and assault may never have taken place.

Under these circumstances, the panel should have followed the guidelines of the Supreme Court in *Remmer*

v. United States, supra, and should have remanded for an evidentiary hearing. Then, if it developed that the charge of tampering was unsupported, the panel could affirm. If the charge was supported and found to be prejudicial, the panel could then reverse. *Remmer v. United States,* 350 U.S. 377 (1956).

The trial in the District Court, having lasted as it did for nearly three months, has caused terrific expense to the plaintiffs, as well as to the state of Ohio which defended the Guardsmen, the Governor, and the President of Kent State. Expense was also incurred in the defense of the criminal trials against the Guardsmen in the District Court, which trials resulted in directed verdicts of acquittal.

Also, as this Court as well as two Justices of the Supreme Court know, even now all is not quiet on the front.

I do not address other issues appearing in this case, namely the liability of members of the Guard who fired no shots; the liability of officers of the Guard who issued no order to fire; the liability of officers and members of the Guard who were not even present during the riots and shootings.

En banc consideration should have been granted.

The judgment in favor of the Governor should be affirmed. The Jury Issue should be remanded to the District Court for an evidentiary hearing under the guidelines of *Remmer v. United States, supra.*

MEMORANDUM AND ORDER OF THE DISTRICT COURT

(Filed September 25, 1975)

Civil No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, *et al.*,
Plaintiffs,

vs.

JAMES A. RHODES, *et al.*,
Defendants.

MEMORANDUM AND ORDER

YOUNG, *J*:

Plaintiffs have filed an elaborate motion for a new trial on all of the issues in these cases, and also a motion for judgment notwithstanding the verdict upon the issue of unlawful dispersal. The motions are supported by a memorandum, and opposed by memoranda of the defendants generally and of the defendant Rhodes individually.

The motions will be overruled.

While it is this Court's usual practice to give a full analysis and state in detail its reasons for its rulings, the trial of this group of cases has been unique in this Court's experience, and must necessarily be treated differently than more routine matters. To analyze and rule with particularity upon each of the grounds stated for the plaintiffs' motions would add a great deal of length, but very little, if any, substance to the ruling stated.

Both as to the facts and the law, every single point and element of these cases was disputed. By its various memoranda, and by innumerable oral rulings made during the course of the trial, the Court has stated its reasons for its decisions as to points of law, including all of the points raised by the plaintiffs in these motions. The Court has no stomach to sort out and repeat these rulings.

This Court is satisfied with the correctness of its previous rulings upon the legal issues raised in the plaintiffs' motions, although some of them are very complex, and the law upon them is not well-settled.

However, the law does not exist in a vacuum of facts, and in these cases the factual problems are at least as complex as the legal issues which either govern them or depend upon them for resolution. Again these cases are highly unusual in that every single factual issue involves a complete conflict in the evidence. No one who considered all of the evidence impartially could say that there was an overwhelming weight of the evidence one way or another. It is basic in our law that only a jury can properly determine what evidence is to be believed, and what evidence is not to be believed, and what credibility is to be given to numerous witnesses. The jury has done that in these cases. It is utterly impossible to say that reasonable minds could come to only one conclusion about the facts in these cases. In the extremely emotional context of every aspect of this matter, it is more realistic to wonder how reasonable minds could bring themselves to reach any of the almost innumerable conclusions that might have been reached. The collective minds and consciences of three-fourths of the twelve men and women who labored long and tearfully to reach their conclusions cannot be considered as unreasonable, or as being wrong about the verdict which they reached.

The tragic reality of the trial of these cases is that nothing about it, not even the shooting of the plaintiff Lewis by the defendant Shafer, was so simple as the plaintiffs' memorandum suggests. It is not improbable that this episode was the spark that ignited the powder-keg, from one view of the evidence. However that may be, it was, under the law, not to be looked at just from the bald statements of the witnesses, nor the photographs which were taken from behind Lewis and looking at Shafer. It was to be looked at through Shafer's eyes as he, and not someone else, saw it that unhappy noontide. Only a jury could take that look, and every intendment must be taken in favor of what they saw and reported by their verdicts.

This Court believes that the case was fairly tried, that the legal issues were correctly determined and explained to the jury, which understood and followed the Court's instructions, and that the jury's resolution of the factual issues should not be interfered with.

For the reasons stated herein and for good cause appearing, it is

ORDERED that the motions filed by plaintiffs for a new trial and for judgment notwithstanding the verdict should be, and they hereby are, overruled; and it is

FURTHER ORDERED that judgments should be entered upon the verdicts in favor of the defendants, and each of them, and that the defendants should go hence without day, and recover their costs herein expended.

IT IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge
N.D. Ohio, W. Division

CONSTITUTION OF THE UNITED STATES

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

RULES OF THE SUPREME COURT OF THE UNITED STATES

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 46.

EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

FEDERAL RULES OF EVIDENCE

Rule 606.

COMPETENCY OF JUROR AS WITNESS

* * * * *

(b) Inquiry into validity of verdict or indictment.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial in-

formation was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

As amended Pub.L. 94-149, § 1(10), Dec. 12, 1975, 89 Stat. 805.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1017

JAMES A. RHODES,
Petitioner,
vs.
ARTHUR KRAUSE, et al.,
Respondents.

No. 77-1018

SYLVESTER DEL CORSO, et al.,
Petitioners,
vs.
ARTHUR KRAUSE, et al.,
Respondents.

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IN THE

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No. 77-1018

SYLVESTER DEL CORSO, et al.,

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v.

ARTHUR KRAUSE, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

I. SHOULD THIS COURT REVIEW THE DECISION BELOW, WHICH FOLLOWS THIS COURT'S PRECEDENTS AND IS NOT IN CONFLICT WITH DECISIONS IN ANY OTHER CIRCUIT, REGARDING REMAND FOR NEW TRIAL BECAUSE OF THE ACTIONS BY THE TRIAL COURT AFTER A JUROR WAS THREATENED?

II. SHOULD THIS COURT REVIEW THE EVIDENCE AND THE DETERMINATIONS OF THE TWO LOWER COURTS DENYING DEFENDANTS RHODES AND DEL CORSO DIRECTED VERDICTS?

III. DOES THE KILLING AND WOUNDING OF UNARMED STUDENTS BY NATIONAL GUARDSMEN, IN THE COURSE OF DISPERSING AN ASSEMBLY, GIVE RISE TO A CAUSE OF ACTION UNDER 42 U.S.C. § 1983?

REASONS FOR DENYING THE WRITS

Introduction and Summary

The respondents, 1/ who were plaintiffs below, are the nine wounded students (or, where appropriate, their parents as guardians ad litem) and the personal representatives of the estates of the four students who were killed. They filed their actions in the United States District Court for the Northern District of Ohio seeking compensatory and punitive damages, alleging deprivations of civil rights under the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983, and alleging

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1/ Hereinafter, for clarity, respondents will be called plaintiffs and petitioners will be called defendants.

pendent claims based upon negligence, assault and wrongful death. The thirteen cases were consolidated for trial.

The petitioners, who were defendants below, are the Ohio National Guardsmen who fired a thirteen-second fusillade into the crowd of students; their officers at the scene; the Adjutant General of the Ohio National Guard (Del Corso); and the Governor of Ohio (Rhodes).

The trial was conducted for nearly fifteen weeks, commencing on May 19, 1975, and continuing until the jury returned its verdicts on August 27, 1975. After entry of judgments on the jury verdicts for all the defendants, plaintiffs appealed. Plaintiffs argued that (1) the jury verdicts on the claims for wrongful woundings and killings were unsupported by substantial evidence; (2) the evidence on the First Amendment claims required a directed verdict for plaintiffs; (3) the jury verdicts were tainted by intrusions on the jury that were improperly handled by the district court; (4) prejudicial errors in the jury charge required reversal; and (5) erroneous rulings on evidence severely prejudiced the plaintiffs.

The Court of Appeals for the Sixth Circuit reversed and remanded for a new trial because of the trial judge's improper handling of a jury intrusion. In a separate concurring opinion, Judge Edwards stated he would reverse in addition because some of the trial judge's actions themselves constituted a prejudicial jury intrusion. Petitioners' Joint Appendix at A 33 to A 35. 2/

2/ Hereinafter cited as "PJA at A __."

Plaintiffs' First Amendment and Eighth Amendment claims were ordered dismissed by the Court of Appeals. The Court of Appeals also held that neither the plaintiffs nor the defendants were entitled to a directed verdict on the due process and pendent state claims. PJA at A 19. The Court of Appeals also explicitly stated that plaintiffs' other contentions concerning jury charge and trial errors would not be dealt with in detail but only as necessary to avoid error at another trial. PJA at A 3, A 17 and A 19.

After a majority of the Court of Appeals denied defendants' petitions for rehearing and suggestions of rehearing en banc, defendants petitioned this Court for writs of certiorari. Defendant Rhodes (No. 77-1017) asserts that excessive force does not constitute a denial of due process under 42 U.S.C. § 1983 and also that he is entitled to judgment on the record. Defendants Del Corso, et al. (No. 77-1018), assert that the Court of Appeals imposed too harsh a standard on the trial court for dealing with jury intrusions and that the Sixth Circuit's decision is in conflict with a Second Circuit decision dealing with jury intrusions. Defendant Rhodes joins in this contention. Defendant Del Corso also asserts that he is entitled to judgment on the record.

Plaintiffs submit that none of the issues presented by the defendants is suitable for review by this Court. At present, the case presents essentially factual questions, with no recurring unresolved issues of law. And, on the merits, the defendants are wrong as to each issue they press. Moreover, even if the defendants were to prevail on their

issues, they still might not be entitled to an order affirming the district court's judgments in their favor.

Furthermore, the case and the issues are not in a proper posture for this Court's treatment. For example, review of the defendants' issues at this time would bring before the Court the numerous other issues presented by plaintiffs in the Court of Appeals, and would require this Court to review the extensive record in this case to resolve all these issues. Notably, if certiorari were granted on defendants' petitions, plaintiffs would be entitled to support the Court of Appeals judgment remanding for a new trial by urging any argument supporting that judgment that is raised in the record and was preserved in the appeal. Swarb v. Lennox, 405 U.S. 191, 202 (1972) (White, J. concurring) and 204 n.1 (Douglas, J. dissenting); Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970); Mills v. Electric Autolite Company, 396 U.S. 375, 381 n.4 (1970); United States v. Raines, 362 U.S. 17, 27 n.7 (1960); Langnes v. Green, 282 U.S. 531, 535-39 (1931); United States v. American Railway Express Company, 265 U.S. 425, 435-36 (1924). See Stern, "When to Cross-Appeal or Cross-Petition -- Certainty or Confusion?" 87 Harv.L.Rev. 763 (1973-1974).

In support of the Court of Appeals judgment, plaintiffs would argue before this Court that the Court of Appeals erred in ruling against them on several issues. If they are correct on these points, plaintiffs would still be entitled to a new trial. These issues include, inter alia, plaintiffs' contentions that: (I) There was no substantial evidence to sustain the jury

verdicts for the claims based upon wrongful killings and woundings; (2) the trial court should have granted a directed verdict on plaintiffs' First Amendment claims and placed that verdict before the jury in connection with plaintiffs' other claims; (3) the trial court committed reversible error by refusing plaintiffs' motion to dismiss with prejudice their state law claims, thereby causing the trial court to deliver a prejudicially prolix and incomprehensible jury charge.

Plaintiffs would also assert before this Court the numerous other serious issues they raised in the Court of Appeals, which that court delined to reach. If plaintiffs are correct in their arguments on these additional issues, they still would be entitled to a new trial. These issues include, inter alia, numerous incorrect and prejudicial rulings on evidence that are strikingly inconsistent with the new Federal Rules of Evidence. Assuming arguendo that the defendants were to prevail on the issues they are attempting to bring before this Court, and the Court agreed with the Court of Appeals on each of the other issues that court decided against the plaintiffs, this Court would then either address plaintiffs' unresolved questions or it would remand to the Court of Appeals with directions that it decide those issues. Powell v. McCormack, 395 U.S. 486, 500 n.16 (1969); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 704 (1967). If they were to prevail on any of these issues, the plaintiffs would still be entitled to a remand for a new trial.

Moreover, if defendants were to prevail in this Court only on the jury intrusion issue, it is most probable that the case would still have to be remanded to the district

court for evidentiary proceedings on that issue. See Del Corso Pet. No. 77-1018 at p. 14. A new trial might still be ordered and further appellate proceedings certainly would occur. Thus, in effect, the defendants seek interlocutory review of the case.

This Court has rarely granted a writ of certiorari to review a reversal by a court of appeals for abuse of discretion, where the court of appeals also remanded for new trial. This is true partly because of the necessity to preserve this Court's resources when a lower court may dispose of a case or issue. See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967) (case unripe because of remand order on major issue); Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916) (certiorari originally denied because of remand).

Research by plaintiffs' counsel reveals that virtually all of the cases in which this Court has granted a writ of certiorari after a court of appeals has reversed for abuse of discretion and remanded for new trial, have involved the peculiar problems of the role of the jury as factfinder under the Seventh Amendment, often in the Federal Employers' Liability Act context. This Court has explained its extraordinary review of such cases:

> Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their

right to a jury determination.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 510 (1957). The case at bar does not present the problems which arise in such litigation. The Court of Appeals action in the instant case evinces no disrespect for the jury. Indeed, remand for a new trial is necessary in this case to assure fair jury determinations.

The Court of Appeals remand for new trial as a result of the District Court's improper handling of the jury intrusion raises no important issue for this Court's determination. Settled law was followed. Moreover, there is no conflict with the Second Circuit decision cited by defendants, which is inapposite on its facts.

Defendants Rhodes' and Del Corso's requests for review of the denial of directed verdicts to them presents a factual matter with no importance except to the parties involved. Two lower courts have reviewed the record and each of them has concluded that there is sufficient evidence to go to the jury. The legal issues involved have been clearly resolved by numerous decisions of this Court, which were properly followed by the lower courts. Notably, the standard governing executive immunity from Section 1983 liability has already been fashioned.

Defendant Rhodes' question of whether excessive force gives rise to a Section 1983 claim, presents a frivolous issue. There is no inconsistency with the decisions of this Court; this Court has concluded, and all circuit courts which have passed upon the

issue have held, that excessive force gives rise to a claim under Section 1983.

Plaintiffs submit that the case should be remanded immediately for retrial on the relatively narrow issues now framed by the Court of Appeals, centering around the question "whether excessive force was employed" under the conditions that pertained on May 4, 1970. PJA at A 20.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE COURT OF APPEALS CORRECTLY APPLIED SETTLED PRECEDENT IN ORDERING A NEW TRIAL AFTER THE TRIAL COURT GROSSLY MISHANDLED A JURY INTRUSION.

Defendants argue that the decision of the Court of Appeals to reverse for abuse of discretion and remand for new trial is inconsistent with this Court's decisions and in conflict with a decision by the Court of Appeals for the Second Circuit. This simply is not so.

On August 20, 1975, after more than thirteen weeks of trial, the trial judge called counsel to his chambers and announced that:

> [A]t least one of the jurors has been approached on several occasions and threatened and actually physically assaulted in connection with the threats; threats have been made on his family, if he doesn't bring in

a verdict in a certain way.

TR. 11,887. 3/ Counsel for plaintiffs asked for interrogation of the juror by the trial court. Tr. 11,893, PJA at A 23; TR 11,898-11,899, PJA at A 24. The trial judge brushed the request aside, indicating that the juror in question could be replaced by an alternate. Tr. 11,896; TR 11,902, PJA at A 23. His major concern was protection for the rest of the jury, which could be provided only by sequestration for the balance of the trial and deliberations. TR. 11,888-11,889, PJA at A 21-A 22; TR. 11,899, PJA at A 24; TR. 11,902-11,903, PJA at A 26; TR. 11,907, PJA at A 27.

No counsel objected to the in-chambers proceeding. All accepted the facts to be true as reported by the United States Marshal, who had interviewed the juror, and United States Attorney: that the juror had been approached on several occasions, threatened and physically assaulted, and threatened with harm to his family if he did not bring in a specified verdict (TR. 11,887); that there were three approaches to the juror, including one in which the juror was grabbed and pushed back against a wall and warned that he better not find the verdict the wrong way (TR. 11,891); that the threats included a threat to the life of the juror and a threat to blow up his house (TR. 11,898); that one approach occurred in the area of the Courthouse itself, and there was a witness to the actual (TR. 11,903-11,904); and that the Marshal's office had placed the juror under guard and the FBI was commencing an investigation (TR. 11,887).

3/ "TR. _____" citations refer to the Trial Transcript.

The trial judge decided to sequester the jury as soon as they had an opportunity to go home and pack. Over plaintiffs' counsel's vigorous objections (TR. 11,909-11,910, PJA at A 28-A 29; TR 11,912, PJA at A 29-A 30; TR 11,922, PJA at A 33), the trial judge resolved to inform the rest of the jury about the threats in order to explain the reason for the "eleventh-hour" sequestration (TR. 11,907, PJA at A 27; TR. 11,916, PJA at A 30). He also decided to replace the threatened juror with an alternate when the jury retired for deliberation. TR. 11,916-11,919, PJA at A 30-A 31. After the charge to the jury had been read, the judge changed his mind and allowed the juror to deliberate on the case. TR. 12,519-12,520.

The trial judge never spoke with the threatened juror (TR. 11,897, PJA at A 23), nor did he poll the rest of the jury panel to learn whether they had heard of the threats or had been threatened themselves. Instead, the trial judge ordered all parties and observers to leave the courtroom. Then, with only the jurors, counsel and the court reporter present, the judge left the bench and stood before the jury box (where he could speak more softly so as not to be heard outside the courtroom) and delivered a chilling speech to the jury, which was itself a substantial and unduly frightening intrusion upon the entire jury. TR. 11,931-11,947.

The full text of this speech is reprinted in the concurring opinion of Judge Edwards below. PJA at A 33-A 35. In it, the trial judge recited as an established fact that the life of one of the jurors had been threatened in an attempt to influence

the verdict. As to the rest of the jurors, therefore, it was immaterial whether any such threat had actually occurred; they were told by the judge that the threats had in fact occurred. The judge stated that he personally was "much troubled and disturbed" by knowledge of the threats. He declared that on past occasions he had ignored such threats, and as a result he had "blood on [his] hands." (He had previously told all counsel that there was at least one person dead as a result of his failure to take such a threat seriously in the past. TR. 11,898, PJA at A 24.) He explained that the problems could not be solved merely by discharging the single juror known to have been threatened because others among the jurors might have been threatened, too. He explained he was going to give the threatened juror around-the-clock protection, but that he could not give the rest of the jurors that kind of protection, in spite of the gravity of the peril. Therefore, although he had never before sequestered a jury, he was sequestering this jury.

After this terrifying speech, one of the alternate jurors inquired of the judge about protection for that juror's family, and the judge replied that all he could do was provide a telephone number which a threatened family member might call. TR. 11,942-11,943. At the same time, the judge told the jurors that the alternates were like life insurance, essential in the event one of the other jurors met his or her demise. TR. 11,944-11,945.

Both the second intrusion, actually initiated by the trial judge and affecting the entire jury, and the first intrusion, the threats to the single juror, were

referred to in the majority opinion of the Court of Appeals. PJA at A 4. The obvious prejudicial impact of the second intrusion was relied upon by Judge Edwards in his concurring opinion as an independent ground of decision. PJA at A 33-A 35.

The facts of the first intrusion were established to the satisfaction of the trial judge and all counsel at the proceeding in chambers, which defendants themselves, at page 13 of the Del Corso Petition (No. 77-1018) characterize as a "hearing." Further, defendants submitted in their Petitions for Rehearing and Suggestions for Rehearing en banc in the Sixth Circuit that "the facts surrounding the threat [were] fully disclosed to the trial court and counsel for all parties...." Defendants-Appellees' Petition for Rehearing in Sixth Circuit at 17. The facts of the second intrusion, that of the trial judge, are matters of transcribed record in this case.

Thus, this case is different from Remmer v. United States, 347 U.S. 227 (1954) (hereinafter "Remmer I"). Defendants incorrectly rely upon Remmer I and Remmer v. United States, 350 U.S. 377 (1956) (hereinafter "Remmer II"). In Remmer I, this Court did remand to the district court for further proceedings as to the facts of the alleged jury intrusion, but that was only because the facts of the intrusion were not in the record. 347 U.S. at 229. In Remmer II, after the trial judge had ascertained the facts and had made his own judgment that the intrusion was harmless, this Court reviewed the factual record, reversed the trial court's judgment of harmlessness, and ordered a new trial. 350 U.S. at 380-82.

Remmer II is akin, therefore, to the instant case.

Similarly, the defendants incorrectly argue that there is a conflict between the Sixth Circuit's decision in the instant case and a decision of the United States Court of Appeals for the Second Circuit, United States v. Gersh, 328 F.2d 460 (2d Cir.), cert. denied 377 U.S. 992 (1964). Del Corso, et al., Petition (No. 77-1018) at 15-18. Defendants assert that in the instant case the plaintiffs knowingly waived their right to a recorded interrogation of the juror in the presence of all counsel. The defendants then contend that, under Gersh and two other circuit court decisions, if plaintiffs in fact waived their right to such a hearing, they are entitled neither to an evidentiary hearing nor to a new trial.

Gersh and the two other precedents cited by the defendants, however, are inapposite to the instant case. As the Sixth Circuit held after careful review of the record in this case, there was no knowing waiver by plaintiffs of their right to recorded interrogation of the threatened juror to determine whether he was unaffected by the threats. PJA at A 10-A 11. Plaintiffs repeatedly asked for such an interrogation and then reasonably relied upon the trial judge's declaration that he was going to excuse the threatened juror. PJA at A 3-A 4.

As soon as they were informed of the possibility that the juror had been prejudiced, plaintiffs took all steps required of them to request protective measures short of a mistrial or a new trial. These included requests for recorded interrogation

of the threatened juror by the judge, polling of all jurors in the event the judge informed them of the threats, and excusal of the threatened juror, as well as objection to the trial court's informing the jury of the reasons why they were being sequestered. PJA at A 4-A 5, A 24, A 28-A 30; TR. 11,893; TR. 11,898-11,899; TR. 11,909; TR. 11,910-11,913.

In contrast to the instant case, in Gersh, the defendants were first informed of the possibility that a juror was prejudiced immediately after the jury delivered its verdicts and was excused. The defendants' attorney took no action at that time. Five and one-half weeks later, at sentencing, he did not move for further proceedings by way of recorded interrogation of the juror in question and polling of the other jurors, which the Second Circuit concluded "would still have been entirely practicable." 328 F.2d at 464. He moved only for a new trial on the ground that a voir dire should have been conducted of the juror in question before the case went to the jury. Waiver certainly could be inferred from those circumstances. But, as the record demonstrates and the Court of Appeals held, in the instant case, plaintiffs did not waive their procedural rights; they asserted them at the earliest possible opportunity. And, it is not now "practicable" to conduct the necessary recorded interrogation of the jurors.

In addition, the known facts of the presumed jury intrusion in the Gersh case are not nearly so compelling as those in the instant case. Threats and an assault, directly linked to the outcome of the case, occurred in the instant case. The alleged

intrusion in Gersh involved uncompleted anonymous telephone calls to the forelady. On these sparse facts, so very different from those in the instant case, the Second Circuit held:

> Something more than the mere fact of an unknown and uncompleted contact with a juror is needed to call for vacating a judgment of conviction to permit a hearing which the appellants have not sought.

328 F.2d at 464.

United States v. Dozier, 522 F.2d 224 (2d Cir.), cert. denied 423 U.S. 1021 (1975) is also inapposite to the instant case. It involved no issue of jury intrusion, only an issue of juror competence because of religious scruples to pass judgment. Even on that issue, the proven and uncontested facts demonstrated the competence of the juror in question. Further proceedings would have been redundant.

United States v. Florea, 541 F.2d 568 (6th Cir. 1976), cert. denied 430 U.S. 945 (1977), is also inapposite. This case involved two possible jury intrusions.

The first alleged intrusion involved the agreed-upon presence of one of sixteen prosecution witnesses at the replaying to the jury of a taperecording that was in evidence. "After a review of all the evidence, [the Court of Appeals] conclude[d on the merits] that appellants were not deprived of a fair trial." 541 F.2d at 572. Even though it affirmed the convictions before it in that case, the court of appeals announced a per

se rule prohibiting any such contact in future cases.

The second intrusion in the Florea case involved an attempt to bribe a juror. Without informing the parties or their attorneys:

> The judge summoned a court reporter to transcribe the juror's statement as well as the judge's decision to (1) excuse Juror Number One and replace him with an alternate juror; (2) immediately sequester the jury; (3) not disclose to the parties the reason for the discharge; and (4) direct the FBI to undertake a full investigation.

541 F.2d at 572. Reviewing this record, which disclosed all the relevant facts of prejudice, the court of appeals was able to make a decision on the merits of the question of actual prejudice and "conclude[d] that under the circumstances of this case, appellants were not prejudiced because they were absent when the district judge excused Juror Number One, substituted an alternate, and sequestered the jury." 541 F.2d at 573.

In the instant case, no evidence was available to rebut the clear presumption of prejudice arising from the first jury intrusion, nor did the trial judge act to minimize the prejudicial impact. Reliable evidence cannot now be developed to rebut the presumption of prejudice, well over two years after the events.

Gersh, Dozier and Florea are different

from the instant case in yet another striking respect. In treating the alleged jury intrusions, not one of the other trial judges himself intruded upon the jury. In the instant case, the trial judge delivered his chilling speech which, as Judge Edwards observed, itself "simply went too far." PJA at A 33.

On the uncontested facts in this case, the Sixth Circuit's decision was so clearly correct under controlling legal standards that review by this Court is not called for. For example, it is well settled that:

> Private communications, possibly prejudicial, between jurors and third persons...are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. United States, 146 U.S. 140, 150 (1892). As the Sixth Circuit held (PJA at A 6), this rule that an improper jury intrusion is presumptively prejudicial is applied in civil as well as criminal cases, as indeed the Seventh Amendment mandates. E.g. Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593 (5th Cir. 1977); United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966); Paramount Film Distributing Corp. v. Applebaum, 217 F.2d 101 (5th Cir.), cert. denied 349 U.S. 961 (1954); Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954); Southern Pacific Co. v. Klinge, 65 F.2d 85 (10th Cir.), cert. denied 290 U.S. 657 (1933). To overcome this presumption, the party seeking to avoid a new trial must demonstrate persuasively that the intrusion could not be harmful. See Remmer I, supra, 347 U.S. at 229;

United States v. Williams, 545 F.2d 47, 51 (8th Cir. 1976); United States v. Doe, 513 F.2d 709, 711 (1st Cir. 1975); United States v. Gersh, 328 F.2d 460, 464 (2d Cir.), cert. denied 377 U.S. 992 (1964).

When a court of appeals determines there is a possible prejudicial impact from a jury intrusion, remand for new trial is appropriate. Remmer II, supra; Marshall v. United States, 360 U.S. 310 (1959). See United States v. Betner, 489 F.2d 116 (5th Cir. 1974); United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973).

No affirmative evidence has been presented, nor could it be, in the instant case, that the two jury intrusions were harmless. As the Court of Appeals held (PJA at A 12), remand now for the taking of evidence on that question would be pointless.

The first jury intrusion must now be taken to be prejudicial as a matter of law. Too much time has passed for the defendants to rebut the presumption of prejudice. The trial judge, having held a hearing and found that there had been a jury intrusion, never questioned the threatened juror or the other jurors as to whether they were prejudiced in fact, although asked to do so. PJA at A 3-A 4. See United States v. Pompanio, 517 F.2d 460 (4th Cir.), cert. denied 423 U.S. 1015 (1975) (failure to poll jury, new trial ordered). He also went back on his initial decision to excuse the threatened juror. PJA at A 4-A 5.

The Court of Appeals stated that it had considered ordering a remand for the trial court to take evidence on the question of whether the jury intrusion was harmless.

Recognizing that more than two years had passed since the incidents in question had occurred, the Court of Appeals correctly held:

> Even if questioning the jurors were permitted on the issue of whether the verdict was affected by the incidents, considering the problem of fading memories and natural reluctance of a juror to admit that he had been improperly influenced, we believe it would be impossible now for either the district judge or this court to conclude that the threat and assault disclosed by this record were harmless. Cf. Stiles v. Lawrie, supra, 211 F.2d at 190.

PJA at A 12.

Recent decisions by courts of appeals in three other circuits have also held that the passage of time and dimming memories requires new trials rather than remands for evidentiary hearings on the question of prejudice in jury intrusion cases. United States v. Rhodes, 556 F.2d 599 (1st Cir. 1977); United States v. Betner, 489 F.2d 116 (5th Cir. 1974); Mares v. United States, 383 F.2d 805 (10th Cir. 1967), cert. denied 394 U.S. 963 (1969).

A new trial is especially required in the instant case because of the second jury intrusion, the trial judge's terrifying speech. As Judge Edwards would have held, that jury intrusion was prejudicial as a matter of law. PJA at A 33-A 35. Every reported case of such improper intrusion by a judge in the jury process has resulted in

an order remanding for new trial. See Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593 (5th Cir. 1977); United States v. Gay, 522 F.2d 429, 435 (6th Cir. 1975); Marson v. United States, 203 F.2d 904 (6th Cir. 1953).

II.

THIS COURT SHOULD NOT REVIEW THE EVIDENCE WHEN REASONABLE MINDS COULD EASILY DIFFER AS TO THE LIABILITY OF DEFENDANTS RHODES AND DEL CORSO.

Defendants assert that defendant Rhodes is entitled to judgment on the record, and that defendant Del Corso also may not be held liable because on the record he can properly avail himself of "qualified immunity." The question before this Court is whether the decisions of two courts denying directed verdicts to defendants Rhodes and Del Corso (TR. 10,162-10,163; TR. 1,172-10,173; PJA at A 19) should be reviewed and overturned. In essence these defendants submit to this Court issues of fact, i.e., whether there is sufficient evidence of their liability to require a jury determination.

As the Court has stated many times: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Accord, General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938); Houston Oil Co. of Texas v. Goodrich, 245 U.S. 440 (1918). This is generally so even if it appears the decision below is erroneous. See, e.g., "Work of the Federal Courts," address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v,vi; Mr. Justice Harlan, Manning the Dikes, 13 Record of N.Y.C.B.A. 541, 551 (1958).

This Court's practice of avoiding review of facts is buttressed by the so-

called "two-court" rule. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." Comstock v. Group of Institutional Investors, 335 U.S. 211, 214 (1948). See also Keyes v. School District No. 1, 413 U.S. 189, 198 n.9 (1973) and at 264 (Rehnquist, J. dissenting); Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972) and at 203-204 (Brennan, Douglas, Stewart, J. J., concurring in part and dissenting in part.). This rule rests not only upon deference to the trier of fact, but upon consideration of judicial economy. It applies to fact findings made in response to motions for directed verdicts. See Cole v. Ralph, 252 U.S. 286, 302 (1919).

In the instant case, the trial judge denied directed verdicts to defendants Rhodes and Del Corso. TR. 11,162-11,163; TR. 11,172-11,173. In passing upon the defendants' motions for directed verdicts, the district court found regarding Rhodes that:

> I have studied the record of this case, and I have studied the law and I have tried to figure out what the Supreme Court means in its decisions, and I have come to the conclusion that the evidence in this case does present a question of fact which must be submitted to the jury with respect to the liability of the Defendant Governor Rhodes.

TR. 10,162-10,163. Regarding Del Corso the District Court found that:

> I have been spending several hours each day for the past several weeks reviewing the law and reviewing the facts. . . . And I think there are questions that the jury has to answer as I read the record in this case.

TR. 10,172-10,173.

On appeal, the Court of Appeals reviewed the record and concurred with the District Court, holding that: "Neither the plaintiffs nor the defendants were entitled to a directed verdict on the due process and pendent state claims. Jury issues were presented...." PJA at A 19. Furthermore, the defendants, in their request for rehearing and suggestion for rehearing en banc, explicitly asserted that defendant Rhodes was entitled to judgment on the record, but a majority of the Court of Appeals denied rehearing, concluding that the issues raised therein were fully considered upon submission and decision of the case. PJA at A 36.

In denying directed verdicts, the District Court and the Court of Appeals each properly applied the standard for official immunity established in Scheuer v. Rhodes, 416 U.S. 232 (1974), as did the District Court in its instructions to the jury. TR. 12,480-12,482. Just as this Court said in Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976):

> The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. (Citations omitted.)

With the case in this posture, defendants Rhodes and Del Corso can only be asking this Court to review the facts of the case and determine whether the Court of Appeals' decision regarding the weight of the evidence on the due process and pendent state claims was in error. Since the law on this subject is well established, this factual matter is of no importance except to the parties.

Defendants Rhodes and Del Corso are liable under Section 1983 because they made various decisions and took various actions which were intentional, wanton, reckless or negligent. These decisions and actions were taken with full knowledge of the violation of constitutional rights which would be caused thereby. These decisions and actions were directly and immediately within and affected the chain of causation leading to the actual denials of constitutional rights. Cf. e.g., Rizzo v. Goode, 423 U.S. 362, 373-376 (1976); Allee v. Medrano, 416 U.S. 802 (1974); Hague v. C.I.O., 307 U.S. 496 (1939).

For example reviewing the record in light of this Court's decisions in Gilligan v. Morgan, 413 U.S. 1 (1973) and Scheuer v. Rhodes, 416 U.S. 232, 249 (1974), the Court of Appeals correctly held that the record presented a justiciable controversy regarding the Ohio National Guard's "training, weaponry and orders...." to be decided by the jury. PJA at A 17- A 18. Defendant Del Corso, as Ohio's Adjutant General, and defendant Rhodes, as Ohio's Governor and the commander-in-chief of the Ohio National Guard, promulgated and/

or were responsible for the Guard's "training, weaponry and orders."

Considerable other evidence in the record causally links these two defendants to the tragic events of May 4, 1970.

Defendant Del Corso is the Adjutant General of the Ohio National Guard. 4/ He was present in Kent on May 2nd and 3rd, 1970. He prepared the Ohio Rules of Engagement, which deal with the use of loaded military weapons in civil disturbances. He was in charge of training, equipping and controlling the Guard. He joined in the decision to ban all assemblies, peaceful or otherwise. TR. 7,959-7,960; TR. 8,820-8,821; TR. 8,825-8,826; TR. 7,136; TR. 7, 968; TR. 8,089.

Defendant Rhodes is the commander-in-chief of the Ohio National Guard. He was present in Kent on May 3rd. He knew of the Ohio Rules of Engagement and the problem of overpowered weapons. He inflamed and incited the Guard to resort to unnecessary force on the Kent State campus. He took control of the campus in the face of his admitted lack of authority to do so, and then failed to exercise control over the Guard on campus. He promulgated the

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4/ Contrary to Defendants' contention at p. 19 of the Del Corso Petition (No. 77-1018) there are other cases in which an Adjutant General's liability has been submitted to a jury for determination, and liability was found. O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908). Cf. Fluke v. Canton, 31 Okla. 718, 123 P. 1049 (1912)(dictum).

ban on all assemblies, saying at a meeting on May 3rd, "I don't want to see any two students walking together." TR. 7,962; TR. 7,975-7,976; TR. 7,983-7,984; TR. 7,998-8,000; TR. 7,390; TR. 7,430; TR. 8,458; TR. 8,948-8,949; TR. 8,977-8,978; TR. 9,006-9,007; TR. 9015; TR. 8,884; Crt. Exh. #2; TR. 8,883.

A jury certainly could find that, individually and together, all these decisions and actions proximately caused the woundings and killings of students at Kent State without due process of law, as well as the violation of their First and Eighth Amendment rights. Defendants Del Corso and Rhodes cannot avail themselves of qualified immunity to take the issue of their liability away from the jury. Their actions illustrate their abuse of discretion and bad faith; they knew of the danger to life and First Amendment rights, yet they made no attempt to allay the danger. Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975).

It was not clearly erroneous for the two lower courts to have concluded that reasonable minds could easily differ as to defendants Rhodes's and Del Corso's liability based on the evidence. Therefore, this Court should not review the concurrent conclusions of two courts that directed verdicts for defendants Rhodes and Del Corso are not justified.

III.

THE KILLING AND WOUNDING BY THE OHIO NATIONAL GUARD OF UNARMED STUDENTS AT A PEACEFUL POLITICAL ASSEMBLY GIVES RISE TO A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

Defendant Rhodes argues that this Court should decide that excessive force does not constitute a denial of due process remediable under 42 U.S.C. § 1983. Defendant Rhodes seems to assert that the Court of Appeals should have dismissed the entire action, and by not doing so, the Court of Appeals has decided important questions in a manner inconsistent with the decisions of this Court.

This is a frivolous issue, never before raised by defendants. No decisions of this Court were contradicted by the decision of the Court of Appeals. It is impossible to imagine a case wherein a cause of action under Section 1983 would be more appropriate than the one at bar. As defendant Rhodes states at p. 15 of his Petition (No. 77-1017), "We of course do not contend that the Due Process Clause is implicated only when a state deprives a person of life, liberty or property in the course of punishing that person -- the reach of that Clause is much broader." Indeed, it is easily broad enough to reach the situation in this case. Defendant Rhodes's Petition's statement of facts left out of its denouement the fact that four students were killed by the 13-second fusillade and nine were wounded. These injuries give rise to the "excessive force" component of plaintiffs' claims. The Court

of Appeals reduced the Section 1983 claim to the denial of due process theory; plaintiffs continue to urge in support of their Section 1983 claims the additional theories that both their First and Eighth Amendment rights were also violated. 5/

As defendants must know, their contention that excessive force cannot be the basis of a claim under Section 1983 is frivolous. The tremendous weight of authority demonstrates that excessive force can be the basis for an action under Section 1983. The use of unreasonable or excessive force by a state official acting under color of state law has been held to provide the basis for a Section 1983 claim in ten of the eleven circuits, every circuit that has passed upon the issue. Carter v. Carlson, 447 F.2d 358, 361 (D.C. Cir. 1971), rev'd on other grounds, sub nom District of Columbia v. Carter, 409 U.S. 418 (1973); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied 414 U.S. 1033 (1973); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975); Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971);

5/ Plaintiffs agree with defendant Rhodes, at p. 16 of his Petition, that Ingraham v. Wright, 430 U.S. 651 (1977) does not control this case, but for a different reason. Ingraham is based upon facts too different from the case at bar to control with regard to the scope of Eighth Amendment protection.

Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975); Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975); Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976), cert. denied 97 S.Ct. 740 (1977); MacDonald v. Musick, 425 F.2d 373 (9th Cir.), cert. denied 400 U.S. 852 (1970); Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966). This Court has certainly indicated its agreement. See, Screws v. United States, 325 U.S. 91 (1945).

Defendants have attempted to misread a recent case in this Court as overruling the consistent authority on this point. The dictum quoted at pp. 15-16 in the Rhodes Petition from Paul v. Davis, 424 U.S. 693 (1976) is inapplicable to the instant case. Paul held, in pertinent part, that reputation alone does not invoke the protection of the Due Process Clause, and thus a claim based on defamation is insufficient to sustain an action under 42 U.S.C. § 1983 and the Fourteenth Amendment. In dictum, this Court discussed the limitations on claims under Section 1983, that the injuries contested must be constitutional in scope. The examples the Court used to illustrate injuries not cognizable under Section 1983 were the accidental shootings of innocent bystanders and negligently-caused automobile accidents involving law enforcement officers. Plaintiffs' claims are not like these; they involve constitutional wrongs based upon intentional or reckless shootings of students by National Guardsmen. Such shootings, unlike the examples given in Paul, exhibit the "misuse of power" or the "raw abuse of power" that is the underlying concern of Section 1983. See Monroe v. Pape, 365

U.S. 167 (1961); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). It is this misuse of power, apparent in the use of excessive force, that gives rise to constitutional injury and makes the damage claims herein appropriate under Section 1983.

Finally, contrary to defendants' assertions (Rhodes Petition No. 77-1017 at 17.), Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975), does not create a conflict with the case at bar. Jones does not hold that unreasonable force by a police officer does not give rise to a Section 1983 action. The court in Jones in fact clearly stated that excessive force does give rise to a Section 1983 claim. 528 F.2d at 139. Indeed, the Second Circuit has recently reaffirmed its view that excessive force gives rise to a Section 1983 claim. See Bellows v. Dainack, 555 F.2d 1105, 1106 n.1 (2d Cir. 1977).

Thus, there is no important question concerning Section 1983 and the use of excessive force which should be decided by this Court.

CONCLUSION

The instant case has been remanded to the District Court for retrial. The issues raised by defendants for review by this Court are not important questions of law which have not been, but ought to be, decided by this Court. In its present posture, the case involves essentially factual questions, and the Court of Appeals decision was based on trial errors that constituted abuse of discretion. The

decision of the Court of Appeals was not inconsistent with any decision of this Court. There is no conflict among the circuits on any issue of law raised by the defendants' petitions. Therefore, all the Petitions for Writs of Certiorari in this case should be denied.

Respectfully submitted,

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY MEMORANDUM

We submit this reply to discuss two significant decisions rendered by this Court since the Petition of Certiorari was filed, and to discuss plaintiffs' threat that "review of the defendants' issues at this time would bring before the Court the numerous other issues presented by plaintiffs in the Court of Appeals, and would require this Court to review the extensive record in this case to resolve all these issues." (Opp. 4)[1]

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[1] "Opp." refers to the plaintiffs' Brief in Opposition in this case (No. 77-1017) and its companion (No. 77-1018). "Pet." refers to the Petition for Certiorari in this case.

I.

A. *Procunier* v. *Navarette*, noted at Pet. 22 n.9, has now been decided, 46 U.S.L.W. 4144 (Feb. 22, 1978). That decision both refutes plaintiffs' contention that the second question presented by the Petition—whether the direction of a new trial as to Governor Rhodes is consistent with *Scheuer* v. *Rhodes*, 416 U.S. 232—presents an issue of fact, and also reinforces our view that the Court of Appeals' resolution of that issue was erroneous.

First, *Procunier* determined that the defendants "were entitled to judgment as a matter of law" on the only count that was before the Court. (Slip Op. 7). This suffices to dispose of respondents' principal contention (Opp. 21, 30) that petitioner is seeking review only of the resolution of an issue of *fact* by the Court of Appeals.[2]

Second, *Procunier* confirmed and elaborated upon the qualified immunity test declared in *Scheuer* v. *Rhodes*, 416 U.S. 232 and *Wood* v. *Strickland*, 420 U.S. 308. It held that the defendants had satisfied the first part of the *Wood* rule on the ground that "[w]hether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local

[2] That the issue is one of law rather than fact is not the only reason that plaintiffs' invocation of the "two-court" Rule (Opp. 22) is misplaced. For aught that appears from the District Court's explanation (quoted *id.*), it denied Governor Rhodes' motion for a directed verdict only because of its view that there was sufficient evidence for the jury to impose liability on him for violating the plaintiffs' First Amendment rights. By eliminating the First Amendment claim the Court of Appeals narrowed the issue to whether Governor Rhodes can be held liable for the National Guard's use of "excessive force" against plaintiffs, a limitation that the plaintiffs' argument ignores, see Opp. 24-26. Thus, only the Court of Appeals even decided the immunity question presented by Governor Rhodes' Petition; but its opinion contains nothing which would enable this Court to determine that it properly applied the *Scheuer* and *Wood* standards; and of course the case was decided below without the benefit of this Court's reasoning in *Procunier*.

District Court, there was no clearly established First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners" when the defendants acted. (Slip Op. 9-10). So here, even if, notwithstanding *Paul* v. *Davis*, 424 U.S. 693, it remains open to plaintiffs to contend that they had a right under the due process clause which was violated, they surely cannot maintain that such a right had been "clearly established" in May, 1970.[3]

The *Procunier* decision also sustained the immunity defense "under the second branch of the *Wood* v. *Strick-*

[3] Of the cases cited by plaintiffs (Opp. 28-30) only *Screws* v. *United States*, 325 U.S. 91 and *Monroe* v. *Pape*, 365 U.S. 167 were decided by this Court. *Monroe* involved "the guarantee against unreasonable searches and seizures contained in the Fourth Amendment * * * made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." 365 U.S. at 171. *Screws* involved the treatment of a prisoner, rather than the alleged use of excessive force to deal with an ongoing offense. Moreover, the purpose and effect of the beating which was inflicted on the victim in *Screws* was to prevent him from enjoying the due process right to a trial for the crime for which he had been arrested; it was that right, which is not involved here, which brought the Due Process Clause of the Fourteenth Amendment into play. *Screws* is thus entirely consistent with the interpretation of the Fourteenth Amendment in *Paul* v. *Davis*, that the Due Process Clause provides "procedural guarantees" (424 U.S. at 701, quoted at Pet. 15). Plaintiffs studiously ignore this portion of the opinion in their discussion of the first question presented—whether plaintiffs were deprived of life, liberty or property without Due Process of Law.

With respect to *Stengel* v. *Belcher*, 522 F.2d 438, the only Sixth Circuit case cited by plaintiffs, it suffices to say that it was decided five years *after* the events here in question. Indeed, since the cases from "ten of the eleven circuits" cited at Opp. 28-29 arose under a wide variety of circumstances and imposed liability on several mutually inconsistent constitutional theories, the only lesson which they teach is that suits under § 1983 which charge the use of "excessive force" are so frequent, and the reasoning of the lower courts is in such disarray, that if *Paul* v. *Davis* has not already established a controlling principle, review should be granted to further clarify when the use of such force constitutes the invasion of a constitutional right. The phrases "misuse of power" and "raw abuse of power" which plaintiffs invoke (Opp. 29) do not guide the decision-making process so much as describe the conclusion.

land standard, which would authorize liability where the official has acted with malicious intention to deprive the plaintiff of a constitutional right or to cause him other injury." (Slip Op. 10). The Court explained: "This part of the rule speaks of intentional injury, contemplating that the actor intends the consequences of his conduct. See Restatement (Second) of Torts, § 8A." (*Id.* at 10-11.) The Court contrasted conduct whereby although "the actor has subjected the plaintiff to unreasonable risk, he did not intend the harm or injury that in fact resulted. See *id.*, § 282 and comment d." (*Id.* at 11.) The arming of the National Guard, and the Ohio Rules of Engagement (the only matters on which plaintiffs rely apart from the alleged decision to ban all assemblies) may have "subjected the plaintiff[s] to unreasonable risk" but, even if otherwise attributable to Rhodes are far from evidence that he "intend[ed] the harm or injury that in fact resulted". Indeed, while they recite the litany that defendants Rhodes and Del Corso "made various decisions and took various actions which were intentional, wanton, reckless or negligent" (Opp. 24), even plaintiffs do not contend that these defendants intended that any students would be killed or otherwise physically injured.

B. In urging review of the Court of Appeals' direction of a new trial because a juror had been threatened, petitioners in this case and in No. 77-1018 (where the reasons for review on this point are discussed) urge that the Court of Appeals exceeded the scope of its appellate authority. See particularly our formulation of the juror issue in questions 3(a) and (b) at Pet. 2. The Court addressed this very point in *Arizona* v. *Washington*, 46 U.S.L.W. 4127 (February 21, 1978), although in a somewhat different context:

> "There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be. See *Wade* v. *Hunter*, 336 U.S., at 687." (Slip op. 16-17, footnote omitted).

By a parity of reasoning, the Court of Appeals should have deferred to the trial court's determination that the threat to a juror did not infect the verdict, or at most should have remanded the case for a hearing after which the trial court could make a further evaluation of the impact on the juror. Review of the issue should be granted in the exercise of this Court's supervisory power.

II.

Plaintiffs declare that if defendants' Petitions for a Writ of Certiorari are granted, they will raise, as respondents, a multitude of issues unrelated to the questions presented for review. This *in terrorem* argument ignores the well-established limitations on the ability of a respondent to thrust new issues upon this Court.

First, "absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder. *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 190; *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n.2. That proposition is applicable to all of the issues which plaintiffs recite at Opp. 4-5, for each would, if sustained, enlarge plaintiffs' rights under

the Court of Appeals' judgment.[4] Moreover, even where this Court has jurisdiction to entertain a respondent's issues it often declines to do so where they are not "of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 241-242, n. 16. See also, *e.g.*, *United States* v. *ITT Continental Baking Co.*, 422 U.S. 223, 226-227, n. 2, approved on this point by the dissenting opinion, *id.* at 244, n. 2. *Nobles* is particularly in point, for there the Court of Appeals had granted a new trial and this Court reversed, reinstating the District Court's judgment, without passing on the respondent's alternative grounds for granting a new trial. Since none of respondents' points is independently worthy of this Court's attention,[5] adherence to this rule of practice will protect the Court from considering them if it grants review of the meritorious and important questions presented by Governor Rhodes.

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[4] The first two enumerated issues would result in judgment in plaintiffs' favor rather than a new trial; a decision in their favor on the third enumerated point and the evidentiary issues would alter the terms of the new trial by circumscribing the trial court's discretion.

[5] Plaintiffs have in fact filed a Cross-Petition to review the judgment below, in *Krause* v. *Rhodes*, No. 77-1022. They there raise only the First Amendment issue, which bespeaks their own understanding that the other issues described in their Brief in Opposition herein fail to satisfy the standards of Rule 19. The Brief in Opposition for Cross-Respondent in No. 77-1022 demonstrates that the Court of Appeals' rejection of plaintiffs' First Amendment claim likewise raises no issue meriting review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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